

Y 1.1/5: 100-274

Calendar No. 518

100TH CONGRESS }
1st Session }

SENATE

{ REPORT
100-274

INDIAN SELF-DETERMINATION AND EDUCATION
ASSISTANCE ACT AMENDMENTS OF 1987

DECEMBER 22 (legislative day, DECEMBER 15), 1987.—Ordered to be printed

Mr. INOUE, from the Select Committee on Indian Affairs,
submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 1703]

INDIAN STATE LIBRARY

JAN 28 1988

DOCUMENTS

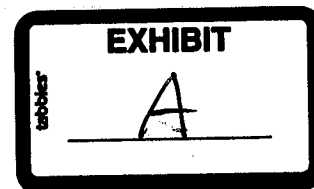
The Select Committee on Indian Affairs, to which was referred the bill (S. 1703) a bill to amend the Indian Self-Determination and Education Assistance Act, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

PURPOSE

The Indian Self-Determination and Education Assistance Act was signed into law by President Ford on January 4, 1975.¹ The Indian Self-Determination Act authorizes tribes to contract with the Secretary of the Department of the Interior and the Secretary of the Department of Health and Human Services to administer previously authorized programs otherwise administered directly by those Departments. The Act was intended to assure maximum participation by Indian tribes in the planning and administration of federal services, programs and activities for Indian communities.

S. 1703, the Indian Self-Determination Act Amendments of 1987, represents a comprehensive reexamination by Congress and Indian

¹ Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203 as amended. See also Public Law 98-250, Act of April 3, 1984, 98 Stat. 118.



tee amendment is intended to insure that the funds needed are continuously available, unless the Congress reduces such funds by appropriations actions.

A new section 106(h) provides that for construction contracts, a tribe is entitled to the full amount of indirect costs based on the total amount of funding if the tribe conducts its own construction, including construction under the Housing Improvement Program. If the tribe subcontracts the construction, the tribe will be able to collect indirect costs only on the amount of funds used by the tribe to oversee the construction subcontract(s).

Section 206. Contract Appeals.—A new section 110 is added to the Indian Self-Determination Act. Section 110(a) confers upon the United States District Court original jurisdiction, concurrent with the Court of Claims, over civil actions or claims arising under the Self-Determination Act. Section 110(a) provides parties aggrieved by federal agency violations of the Self-Determination Act the right to seek injunctive relief in the United States District Courts. The provision also allows an aggrieved party to seek money damages in the Court of Claims or in the district court.

Section 110(d) allows a self-determination contractor to seek judicial review pursuant to the Contract Disputes Act of a decision of an agency contracting officer or of an agency board of contract appeals. Under this provision, a tribal contractor may secure relief in the United States District Courts, including orders that require the offending agency to pay amounts required by the plaintiff's contract. The Committee amendment leaves unchanged existing law allowing direct recourse to the United States Court of Claims for review of contracting officers' decisions.

The Committee amendment affords self-determination contractors the opportunity to secure injunctive relief against the Bureau of Indian Affairs or the Indian Health Service for violations of the Self-Determination Act (or the terms of contracts under the Act) rather than being put to the cost of having to file multiple, annual claims to recover contract damages resulting from such violations, while the same violations continue unchecked.

In *Appeals of Papago Indian Tribe of Arizona*,²³ the Interior Board of Contract Appeals ruled that contract disputes before the Board involving self-determination contracts were not subject to the Contract Disputes Act. The *Papago* decision extended an earlier ruling in *Busby School of the Northern Cheyenne Tribe v. United States*²⁴ that the Contract Disputes Act did not apply to self-determination contractors' claims before the Court of Claims. If given general application, these rulings may have the effect of rendering self-determination contractors who are prevailing parties in such proceedings ineligible to seek an award of legal fees under the Equal Access to Justice Act²⁵ under which "adversary adjudications" at the administrative level subject to the Act are defined in

part by reference to Act.²⁶

Section 110(c), then *Busby* and *Papago* de on an equal footing them to make applic Equal Access to Justi an agency board of tract under the India.

Section 110(c) also cable to other admin resolutions of dispute the Department of I ceedings are invoked tract rights under th in those proceedings member of the affect ly injured by agency Act or the terms of c to benefit that comm Indian Affairs proce 271.81 respecting cor comparable Indian H ject to the Equal Ac the agency boards of

Section 110(c) does nation contractors w States Court of Clai Equal Access to Just contractor plaintiffs United States Distri the same relief avail vail in similar claims

Section 110(c) also isting law concernin nation contractors. l legal expenses incur Department of the Human Services inv tract rights as allow those contracts.²⁷ Se rect costs, however, claims for monetar court. This contrast standard procureme

²⁶ See 5 U.S.C. 504(c)(2)(B). *Fidelity Construction Compa.* (1983), which had held that law were subject to the Eq intent of the Congress in pas

²⁷ See 25 CFR, Part 276, A tion contracts with the Bure to self-determination contra (FMC 74-4), Paragraph B.16 Service).

²³ IBCA-1962 and 1966 (March 17, 1986).

²⁴ 8 Cl. Ct. 596 (1985).

²⁵ Public Law 96-481 (Act of August 1, 1980, 94 Stat. 183).

e funds needed are
duces such funds by

uction contracts, a
costs based on the
s own construction,
ovement Program.
ribe will be able to
ds used by the tribe

110 is added to the
confers upon the
n, concurrent with
s arising under the
s parties aggrieved
ation Act the right
istrict Courts. The
money damages in

actor to seek judi-
ct of a decision of
ard of contract ap-
ay secure relief in
rs that require the
he plaintiff's con-
nged existing law
ourt of Claims for

mination contrac-
gainst the Bureau
r violations of the
ts under the Act)
multiple, annual
n such violations,

a, ²³ the Interior
spites before the
re not subject to
tended an earlier
² *Tribe v. United*
ply to self-deter-
Claims. If given
ffect of rendering
; parties in such
l fees under the
versary adjudica-
ct are defined in

part by reference to proceedings under the Contract Disputes Act.²⁶

Section 110(c), then, reinstates the law as it existed prior to the *Busby* and *Papago* decisions, placing self-determination contractors on an equal footing with other federal contractors by allowing them to make application for an award of legal fees under the Equal Access to Justice Act when they are the prevailing party in an agency board of contract appeals proceeding involving a contract under the Indian Self-Determination Act.

Section 110(c) also makes the Equal Access to Justice Act applicable to other administrative hearings and appeals procedures for resolutions of disputes within the Department of the Interior and the Department of Health and Human Services when those proceedings are invoked to enforce the Self-Determination Act or contract rights under the Act, whether the non-federal party involved in those proceedings is a self-determination contractor or is a member of the affected Indian tribe or community who is personally injured by agency action in violation of the Self-Determination Act or the terms of contracts entered into under that Act intended to benefit that community. Thus, under section 110(a), Bureau of Indian Affairs proceedings under 25 CFR, Part 2 or 25 CFR, Part 271.81 respecting contracts under the Self-Determination Act, and comparable Indian Health Service proceedings would be made subject to the Equal Access to Justice Act just as proceedings before the agency boards of contract appeals.

Section 110(c) does not change existing law allowing self-determination contractors who prevail in contract disputes in the United States Court of Claims to seek an award of legal fees under the Equal Access to Justice Act, nor to the existing law allowing non-contractor plaintiffs to seek such fees upon prevailing in the United States District Courts. Section 110(a) and (d) would make the same relief available to self-determination contractors who prevail in similar claims in the United States District Courts.

Section 110(c) also leaves unchanged certain provisions in the existing law concerning treatment of legal expenses by self-determination contractors. Under these provisions, contractors may treat legal expenses incurred in administrative proceedings within the Department of the Interior or the Department of Health and Human Services involving enforcement of self-determination contract rights as allowable costs incurred in the administration of those contracts.²⁷ Self-determination contractors may not use indirect costs, however, to pay for legal fees incurred in prosecuting claims for monetary relief against the Federal Government in court. This contrasts with the more stringent rules applicable to standard procurement contracts in which a profit factor is built

²⁶ See 5 U.S.C. 504(c)(2)(B). The 1985 amendment was made in part to overturn the decision in *Fidelity Construction Company v. United States*, 700 F.2d 1379 (Fed. Cir.), cert den. 104 S. Ct. 97 (1983), which had held that only agency administrative appeals and proceedings mandated by law were subject to the Equal Access to Justice Act, a ruling inconsistent with the original intent of the Congress in passing the Equal Access to Justice Act.

²⁷ See 25 CFR, Part 276, Appendix A, Part II, Paragraph B.16 (applicable to all self-determination contracts with the Bureau of Indian Affairs) and Circular A-22, Paragraph 34d (applicable to self-determination contracts with the Indian Health Service) or OASC-10, Attachment B (FMC 74-4), Paragraph B.16 (applicable to self-determination contracts with the Indian Health Service).

into the contract price (no profit is allowed on self-determination contract), in which no trust responsibility exists between the contracting parties (the federal government's trust responsibility tempers all of the ordinary contract rules as applied to self-determination contracts), and as to which a primary government objective is to receive the maximum amount of goods or services for the lowest cost (under section 106(h) of the Self-Determination Act, the Federal Government is required to fund self-determination contracts at the same level as would be available to the federal agency to operate the program absent the contract).

Section 110(d) subjects self-determination contractors to the Contract Disputes Act, thereby affording self-determination contractors the procedural protections now given other federal contractors by that Act. Among the most important of these is the requirement that agency contracting officers make prompt decisions on contract disputes. Under existing law, contracting officers administering self-determination contracts face no enforceable deadlines for making decisions on contract disputes and are in effect free to sit on such disputes indefinitely, which they frequently do. This is one of the problems the Contract Disputes Act was intended to cure. This amendment also provides to self-determination contractors the same favorable treatment as to interest on amounts in disputes which is now given to other federal contractors. Thus, under the Contract Disputes Act, computation of interest on the claims for a prevailing party begins at the time the dispute is filed with the contracting officer. Under contract disputes not covered by the Contract Disputes Act, such interests runs from the time the claim is filed with a reviewing Board of Contracting Appeals rather than from the time the claim is filed with the Contracting Officer. The *Busby* and *Papago* decisions took those protections away from self-determination contractors. This amendment restores those protections.

The proposed new section 110(e) would make the amendments at the new section 110(c) and section 110(d)(1) retroactive for a limited class of cases, to protect those self-determination contractors who were deprived of the protection of the Contract Disputes Act (and derivatively the Equal Access to Justice Act) by the *Papago* decision as to proceedings pending before the Interior Board of Contract Appeals involving Indian Self-Determination Act contracts as of March 17, 1986 (or subsequently), the date the Interior Board of Contract Appeals first applied the *Busby* ruling to such board proceedings in the *Papago* decision.

Self-determination contractors which are substantially prevailing parties in such proceedings which terminated between March 17, 1986 and the date of enactment of these amendments, are given a 30-day grace period to make application for an Equal Access to Justice Act fee award.

Comparable provisions were utilized to allow for limited retroactive effect when the 1985 Equal Access to Justice Act amendments were enacted to protect contractors adversely affected by the *Fidelity* decision.²⁸

²⁸ Public Law 99-80 (Act of August 5, 1985, 99 Stat. 183, Section 7 (b) and (c)). See compiler's notes to 5 U.S.C. 504 as to effective date.

The
ensur
were
treat
as pr
the l
Acces
The
deter
IHS c
dies
agenc
deter
natio
violat
law a
such
relief
any c
funds
are u
Act e
strati
limite
other
Not
deter
but th
such
the B
the le
pendin
has an
tled to
rect c
Office
termin
recove
ceive
the co
Burea
fundir
Congr
by the
metho
cable
that si
to rec
curred
the co

²⁹ See .

The provision for such limited retroactivity is appropriate to ensure that those Indian Self-Determination Act contractors who were adversely affected by the *Papago* ruling will be accorded treatment equal with that originally intended by the Congress and as provided for in this amendment. The same rationale gave rise to the limited retroactivity provisions provided in the 1985 Equal Access to Justice Act amendments.

The amendments made by section 110 are necessary to give self-determination contractors viable remedies for compelling BIA and IHS compliance with the Self-Determination Act. The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated particularly in the area of funding indirect costs. Existing law affords such contractors no effective remedy for redressing such violations. Tribal contractors are denied access to injunctive relief to compel agency compliance with the law where the effect of any court order would be to require the Federal government to add funds to the plaintiff's contract.²⁹ Furthermore, tribal contractors are unable to recover legal fees under the Equal Access to Justice Act even when they prevail on contract disputes in agency administrative proceedings. Tribal contractors are obliged to utilize their limited indirect cost funds to pay for legal fees rather than to cover other essential administrative costs.

Not only does existing law make it virtually impossible for self-determination contractors to enforce their rights under the Act, but the Bureau of Indian Affairs has also taken to arguing that such contractors have no legal remedies at all by which to redress the Bureau's failure to fund their contracts with indirect costs at the level mandated by law and by their contract terms. Thus, in a pending Interior Board of Contract Appeals proceeding, the Bureau has argued that even if the self-determination contractor was entitled to receive the amount of indirect costs generated by its indirect costs rate as approved by the Department of the Interior Office of Inspector General (the cognizant Audit Agency for self-determination contracts with the BIA), that the contractor could not recover the difference between the amount it was entitled to receive under the contract, and the amount the Bureau paid. That is, the contractor could not recover ordinary contract damages for the Bureau's breach in failing to fully fund the contract. The type of funding violation involved in that instance was not the product of a Congressional appropriation shortfall, but of a unilateral decision by the BIA to fund indirect costs for the contractor pursuant to a method other than that provided for in the contract and the applicable law. The rationale offered by the BIA for this argument was that since the contractor had not received the funds it was entitled to receive, it had also not spent them and, therefore, had not incurred any costs which could be recovered as an indirect cost under the contract. Clearly, this is an unacceptable argument.

²⁹ See *Alamo Navajo School Board, Inc., et. al. v. Andrus*, 664 F. 2d 229 (10th Cir. 1981).

1 (c). See compiler's

To compound this problem, the Department of the Interior's auditors propose pursuant to the standard terms of the contractors' negotiated indirect cost agreement, to treat the contractor as if it had collected from the BIA the entire amount of indirect costs to which it was entitled under the contract; and, on such assumption, since the contractor did not spend or incur costs at the contractually mandated level, to assume that those funds had been saved and to penalize the contractor in a future year by reducing its indirect costs by the amount of the contractors' presumed savings. This will have the effect of twice penalizing the contractor for the BIA's failure to fund the contractor's indirect costs at the level required by law and the contract terms. This argument reflects a total disregard for the intent of the Congress as expressed in the Indian Self-Determination Act, an abandonment of the BIA's trust obligations to tribal contractors, and amply illustrates the necessity of enacting the remedial measures provided in these amendments.

Section 207. Promulgation of Rules and Regulations.—The provisions for regulations in the Act are updated to require the Secretary of the Interior and the Secretary of Health and Human Services to promulgate self-determination contract regulations consistent with the intent of these amendments in Title 25 of the Code of Federal Regulations. The exemption of self-determination contracts from the federal acquisition regulations contained in Title 41 and Title 48 of the Code of Federal Regulations results in the need for the respective Secretaries to reissue Indian self-determination regulations. The Indian self-determination regulations currently contained in Title 25 and Title 41 of the Code of Federal Regulations shall be used as the starting point in developing new Indian self-determination regulations. The Committee intends that until new regulations are promulgated, the existing regulations, along with the amended Indian Self-Determination Act, shall form the basis of legal and regulatory authority for negotiating Indian self-determination contracts for fiscal year 1989. The new regulations shall be prepared with the active participation of Indian tribal governments and organizations. It is the intent of the Committee that the regulations currently contained in Title 41 of the Code of Federal Regulations, Section 14H-70, should be published in Title 25 of the Code of Federal Regulations, in a revised format consistent with these amendments. There are no programmatic reasons for having separate regulations for self-determination contracts with the Secretary of Health and Human Services in Title 42 of the Code of Federal Regulations. Therefore, a uniform and consistent set of regulations for all Indian self-determination contracts, including contracts with the Secretary of Health and Human Services, should be contained in Title 25 of the Code of Federal Regulations. The regulations regarding contracts under the Indian Self-Determination Act should be relatively simple, straightforward, and free of unnecessary requirements of procedures. The Committee expects the Secretary of the Interior and the Secretary of Health and Human Services to work closely with tribes in the initial drafting of these regulations, as well as in the subsequent refinement of proposed rules for publication. This section establishes a time-frame for promulgating regulations to implement the Act. The Committee intends for these amendments and regulations promulgated thereunder to become

effective prior
enactment of

Section 20.
nated as sub
porting requ
the requirem
with the Adr
--*Section 20.*
1703 authori
for Indian t
would expire
to enter into
the written i
tends for the
and a tribe w
agreement n
ing consolida

The amount
would be at
under Public
programs ex
solidated fun
services for i
the tribe agr

A consolida
sions on the
would submit
retary for re
and approve
tion 102 of th

Furthermo:
United State
at the electio
ceiving fundi
the contract
tracts pursua
plies, steals, c
suant to a co
to criminal p
nation Act.

Finally, the
receiving fun
and benefits
wise, the Sec
mittee amend
members to t
benefits to t
amendment.
flexibility to
bers. It is no
ment and sec
authorize or
trust respons
people.