



United States Department of the Interior



OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

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Memorandum

To: Under Secretary

From: Associate Solicitor, Indian Affairs

Subject: Request for Opinion on Certain Aspects of Self
Governance Contracts under Pub. L. 100-472

You have requested our views on two questions pertaining to contracts with tribes under Title III of the Indian Self-Determination and Education Assistance Act of 1975, as amended (Title III):

- Is rulemaking required to govern the negotiation of contracts with tribes under Title III?
- What is necessary to determine that a tribe has "... successfully complete[d] a Self-Governance Planning Grant..." under § 302(a)(1) of Title III?

Need for Rulemaking. Our view is that rulemaking is not required in order to proceed with negotiations under Title III.

The Administrative Procedure Act of 1946, as amended (APA), 5 U.S.C. §§ 551, 553(a) states inter alia that the APA need not apply to public contracts. We believe there is no need, however, to deal with interpretation of this provision, because the Title III contracting process will satisfy the requirements of the APA, 5 U.S.C. § 553(b), which excepts from the APA those who will be "... named and either personally served or otherwise have actual notice...." of a requirement. Non-federal parties to a Title III contract will have personal access to and actual notice of the contract negotiation process and contractual provisions, and the parties to a contract must agree with the provisions in order for the contract to be binding on them. Under 5 U.S.C. § 553(b), general public notice is not required as to the parties directly involved and personally informed concerning the subject transactions .

Similarly, the dynamics of Title III can operate to provide all other affected tribes with personal service and actual knowledge of all provisions of proposed contracts. Section 303(a)(9) of Title III requires, in part, that annual funding agreements -

shall be submitted by the Secretary ninety days in advance of the proposed effective date of the agreement to each tribe which is served by the agency which is serving the tribe which is a party to the funding agreement

As a result, all tribes in a multi-tribe agency potentially affected by a Title III contract will be personally served with documents and have actual knowledge of provisions of proposed contracts within their agency. Multi-agency tribes, along with all other tribes and tribal organizations affected by a proposed Title III contract, are to be given an opportunity to react to relevant contract provisions through section 306 of Title III, which provides:

Nothing in this title shall be construed to limit or reduce in any way the services, contracts or funds that any other Indian tribe or tribal organization is eligible to receive under section 102 or any other applicable Federal law and the provisions of section 110 of this Act shall be available to any tribe or Indian organization which alleges that a funding agreement is in violation of this section.

Section 110 makes the Contracts Disputes Act, Pub. L. 95-563, as amended, applicable to self-determination contracts. Section 306 of Title III gives appeal rights under the Contracts Disputes Act to each tribe or tribal organization where a Title III agreement with another tribe potentially diminishes a BIA service to the complaining tribe or tribal organization. Appeal rights appear to exist whether the program benefit is provided by BIA's national, Area, or Agency offices.

It may be possible to construct processes and a supporting rationale to the effect that all tribes and tribal organizations need not have individual service and actual knowledge of relevant contract provisions in order to protect their appeal rights under section 110. At a minimum, however, Congress has indicated in section 303(a)(9) that it intends direct and personal knowledge shall be given to tribes at a multi-tribal agency. As to affected tribes at the Area and national levels, it is arguable that Congress would not intend some sort of disparate treatment for other tribes in the form of public or other constructive notice of contract provisions affecting them. It is also arguable that public or constructive notice to affected tribes is not consistent with meaningful exercise of appeal rights under the Contract Disputes Act; as provided by sections 306 and 110 of the Indian Self-determination Act. Finally, actual notification of relevant contract provisions to tribes affected by those provisions will serve to satisfy the "personal service and actual knowledge" exception to APA and will lessen the risk of successful challenge to the contracting process under Title III for failure to comply with the rulemaking provisions of APA.

In summary, BIA can mail (or deliver directly through its agency-level organizational network) relevant contract provisions to affected tribes and tribal organizations to implement section 306 of Title III. If this is done, particularly within the time requirements of section 303(a)(9), a strong argument can be made that, even without formal rulemaking, tribes and tribal organizations affected by Title III contracts will have uniform access, as well as personal service and actual knowledge concerning the contracts, thereby minimizing the risk of successful APA challenge to the contracting process.

We do not believe that a rule is necessary to establish the eligibility of tribes to negotiate under Title III because, at least as to the tribes currently under discussion, the statute itself establishes their eligibility. Concerning the actual content of work programs and deliverables under Title III contracts, there is no statutory requirement of uniformity between such provisions under Title III, or under Pub. L. 93-638 generally. Further, there is evidence of Congressional intent that Title III agreements shall indeed be research and demonstration projects (as they are described in section 301 of Title III), and that contracts can differ, with each to be assessed on its own merits. As Chairman Udall of the House Committee on Interior and Insular Affairs remarked in explaining the Title before passage, 134 Cong. Rec. H7372 (daily ed. Sept. 9, 1988), "... it is my understanding that such agreements will be different from each other. Therefore, each will have to have its legality determined independently."

Finally, section 303(d) of Title III provides for appeals in disputes involved in Title III agreements by bringing the agreements themselves within the Contract Disputes Act, Pub. L. 95-563, as amended. It would appear that additional rules of general applicability are not necessary.

"Successful Completion" of a Self-Governance Grant. Section 302(a)(1) of Title III provides, "A tribe that successfully completes a Self-Governance Planning Grant, authorized by Conference Report 100-498 to accompany H.R. 395 ..., shall be selected to participate in the demonstration project."

The term "successfully completes" is not defined or explained in the Act or the legislative history. There is no indication in the Act or the legislative history of tribal reports or other planning grant products or deliverables required of tribes, other than a provision in Conference Report 100-498: "Each of the tribes shall document obstacles and proposed remedies identified in its planning process, to be consolidated into a comprehensive report to be submitted to the Appropriation Committees by September 1, 1988." The Assistant Secretary -- Indian Affairs submitted the report to Congress on December 15, 1988, and indicated that the required progress reports had been received from all ten tribes with planning grants (which would include the

five tribes currently applying for self-governance contracts). The BIA report contains no indication that any tribal progress report was deficient.

The most obvious place to look for project completion requirements is in the grant instruments, with accompanying documents, which accomplished the planning grant awards. In discussing the awards with Area Offices, it appears there were two types of products or reports required in the grant documents -- programmatic reports or final planning deliverables and financial reports on status of funds or similar reports to satisfy BIA financial management requirements. Area staff inform us that the grants were negotiated and signed in Washington, and the documents differed considerably in content. All documents were sent to BIA Area Offices, and we are having copies returned to us.

At this stage, awaiting the opportunity to review any special requirements in specific grant documents, our view is that tribal compliance with the programmatic and financial reporting or deliverable requirements in planning grant documents will constitute "successful completion" of the grants.



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