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[Comments on Interior's Methods for Awarding Contracts Under P.L. 93-638]

Number: B-222665

Date: 1986-07-02

B-222665, JUL 2, 1986

INDIAN AFFAIRS - CONTRACTS - BUREAU OF INDIAN AFFAIRS - INDIAN SELF DETERMINATION ACT - COMPLIANCE DETERMINATION DIGEST: UNDER THE INDIAN SELF-DETERMINATION ACT, WHICH IS TITLE I OF PUB.L. NO. 93-638, JANUARY 4, 1975, THE DEPARTMENT OF INTERIOR USED CONTRACTS WITH INDIAN TRIBES TO GIVE MONEY, PROPERTY AND SERVICES FOR THE NEEDS OF THE RESPECTIVE TRIBES. UNDER THE FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977, 31 U.S.C. SEC. 6301 ET SEQ., WHEN THE PRINCIPAL PURPOSE OF A RELATIONSHIP WITH A RECIPIENT IS THE TRANSFER OF MONEY, PROPERTY OR SERVICES FOR THE SUPPORT OF THE RECIPIENT, A GRANT OR COOPERATIVE AGREEMENT IS TO BE USED, AND NOT A CONTRACT. BY VIRTUE OF PUB.L. NO. 98-250, APRIL 3, 1984, THIS ASSISTANCE UNDER THE INDIAN SELF DETERMINATION ACT IS NOT SUBJECT TO THE REQUIREMENTS OF THE FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT, AND THEREFORE, THE DEPARTMENT OF INTERIOR MAY CONTINUE TO USE THE CONTRACT FORM OF AGREEMENT.

THE HONORABLE PARREN J. MITCHELL:

CHAIRMAN, COMMITTEE ON SMALL BUSINESS

HOUSE OF REPRESENTATIVES

YOUR LETTER OF MARCH 19, 1986, QUESTIONS THE USE OF CONTRACT INSTRUMENTS BY THE DEPARTMENT OF THE INTERIOR (INTERIOR) TO MAKE AWARDS UNDER THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT, PUBLIC LAW 93-638. YOU INDICATE THAT UNDER THIS ACT INTERIOR GIVES MONEY TO INDIAN TRIBES FOR THE PURCHASE OF FOOD, CLOTHING, CONSTRUCTION AND OTHER ITEMS AND SERVICES NEEDED BY THE RESPECTIVE TRIBES. IN VIEW OF THE PURPOSES FOR WHICH THESE FUNDS ARE USED, IT APPEARS TO YOU THAT THE USE OF A CONTRACT INSTRUMENT IS INAPPROPRIATE. ACCORDINGLY, YOU REQUEST OUR OPINION AS TO WHETHER IT IS MORE APPROPRIATE TO USE EITHER A GRANT OR COOPERATIVE AGREEMENT AS THE VEHICLE FOR OBLIGATING THESE FUNDS AND WHETHER INTERIOR HAS VIOLATED ANY LAW OR REGULATION BY ITS PAST AND CONTINUED USE OF CONTRACTS.

UNDER THE INDIAN SELF-DETERMINATION ACT, WHICH IS TITLE I OF PUB.L. NO. 93-638, JANUARY 4 1975, 88 STAT. 2206, THE SECRETARY OF THE INTERIOR IS DIRECTED, UPON THE REQUEST OF AN INDIAN TRIBE, TO ENTER INTO A CONTRACT WITH ANY TRIBAL ORGANIZATION TO PLAN, CONDUCT AND ADMINISTER PROGRAMS WHICH THE SECRETARY IS AUTHORIZED TO ADMINISTER FOR THE BENEFIT OF INDIANS (SEC. 102(A)).

THE FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977, PUB.L. NO. 95-244, 92 STAT. 3, NOW CODIFIED AT 31 U.S.C. SEC. 6301 ET SEQ. (1982) PROVIDES THAT WHENEVER THE PRINCIPAL PURPOSE OF THE RELATIONSHIP WITH A RECIPIENT IS THE

TRANSFER OF ANYTHING OF VALUE TO THE RECIPIENT FOR THE PUBLIC PURPOSE OF SUPPORT OR STIMULATION AUTHORIZED BY A FEDERAL STATUTE, RATHER THAN THE ACQUISITION OF PROPERTY OR SERVICES FOR THE DIRECT BENEFIT OR USE OF THE FEDERAL GOVERNMENT, AND NO SUBSTANTIAL INVOLVEMENT IS ANTICIPATED BETWEEN THE FEDERAL GOVERNMENT, AND THE RECIPIENT, THEN A GRANT AGREEMENT SHOULD BE USED. 31 U.S.C. SEC. 6304. IF SUBSTANTIAL INVOLVEMENT IS ANTICIPATED, THEN A COOPERATIVE AGREEMENT IS TO BE USED. 31 U.S.C. SEC. 6305.

IN AN APRIL 28, 1981, OPINION, THE INTERIOR DEPUTY SOLICITOR REVIEWED BOTH OF THESE ACTS. HE CONCLUDED THAT INTERIOR'S BUREAU OF INDIAN AFFAIRS (BIA) WOULD HAVE TO CHANGE ITS PROCEDURES FOR ASSISTING TRIBAL GOVERNMENTS TO OPERATE PROGRAMS FORMERLY CONDUCTED BY THE BIA FROM A CONTRACTING PROGRAM TO FEDERAL ASSISTANCE PROGRAM. GRANTS OR COOPERATIVE AGREEMENTS INSTEAD OF CONTRACT WERE TO BE USED WHEN TRIBAL GOVERNMENTS OPERATE PROGRAMS FORMERLY CONDUCTED BY BIA, SO AS TO REFLECT THE BASIC CHARACTER OF THE RELATIONSHIP.

EARLY IN 1982, INTERIOR PUBLISHED DRAFT REGULATIONS TO REFLECT THE DEPUTY SOLICITOR'S OPINION AND TO CHANGE FROM A CONTRACT TO A GRANT SYSTEM. APRIL 1982 THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS HELD EXTENSIVE HEARINGS AT WHICH INDIAN WITNESSES WERE UNIFORMLY OPPOSED TO THE PROPOSED CHANGE. SUBSEQUENTLY, LEGISLATION SUPPORTED BY THE ADMINISTRATION WAS INTRODUCED TO OVERCOME THE OPINION. SEN. REP. NO. 73, 98TH CONG., 1ST SESS. 1.2 (1983). THE LEGISLATION, ENACTED AS PUB.L. NO. 98-250, APRIL 3, 1984, 98 STAT. 118, AMENDED THE INDIAN SELF DETERMINATION AND EDUCATION ASSISTANCE ACT BY ADDING A NEW SECTION AS FOLLOWS:

"SEC. 9. THE PROVISIONS OF THIS ACT SHALL NOT BE SUBJECT TO THE REQUIREMENTS OF THE FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977 (PUBLIC LAW 95-224, 92 STAT. 3) (CODIFIED AT 31 U.S.C. SEC. 6301 ET SEQ.): PROVIDED, THAT A GRANT AGREEMENT OR A COOPERATIVE AGREEMENT MAY BE UTILIZED IN LIEU OF A CONTRACT *** WHEN MUTUALLY AGREED TO BY THE *** SECRETARY AND THE TRIBAL ORGANIZATION INVOLVED."

CONSEQUENTLY, SINCE THE PASSAGE OF PUB.L. 98-250 ON APRIL 3, 1984, INTERIOR HAS BEEN AUTHORIZED TO IDENTIFY THE INSTRUMENTS IT USES TO OBLIGATE FUNDS UNDER THE INDIAN SELF-DETERMINATION ACT AS CONTRACTS RATHER THAN GRANTS OR COOPERATIVE AGREEMENTS AND CONTINUES TO USE CONTRACTS FOR THESE PURPOSES.