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B-114868

JAN 2 1973

Dear Mr. Chairman:

Pursuant to your request and the request of the Chairman, Senate Committee on Interior and Insular Affairs, the General Accounting Office made a review and issued a report on Selected Contracts, Purchase Orders, and Grants Awarded to Indian Tribes and Organizations during Fiscal Year 1971 by the Bureau of Indian Affairs (BIA), Department of the Interior (B-114868, July 7, 1972).

During our review certain questions arose concerning the authority of BIA to make grants to Indian tribes and organizations, and possible violations of the Federal personnel laws and staff ceilings established by BIA for its area offices. At the time our report was issued, these questions still were under consideration and we stated that we would advise you of our views at a later date. We have completed our review of these matters and our views are set forth below.

GRANT AUTHORITY

The Department of the Interior and Related Agencies Appropriation Act for fiscal year 1971 (84 Stat. 669) provides grant authority as follows.

"For expenses necessary to provide education and welfare services for Indians, either directly or in cooperation with States and other organizations including payment (in advance or from date of admission), of care, tuition, assistance, and other expenses of Indians in boarding homes, institutions, or schools; grants and other assistance to needy Indians; maintenance of law and order, and payment of rewards for information or evidence concerning violations of law on Indian reservations or lands; and operation of Indian arts and crafts shops * * *." (Underscoring supplied.)

Similar language has been included in all appropriation acts after fiscal year 1951. BIA has interpreted such provisions of the appropriation acts as providing authority for grants not only to individual needy Indians but also to Indian tribes and communities to benefit needy Indians.

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We reviewed seven BIA grants, totaling \$238,000, to Indian tribes or organizations. Six of the grants, totaling \$198,000, were for the purchase of materials and labor for building, repairing, and renovating Indian homes under the BIA tribal work experience and housing improvement programs or Office of Economic Opportunity housing programs. The seventh grant of \$40,000 was for salaries, supplies, and other related expenses for the operation of a rehabilitation program for juvenile delinquents by an Indian organization.

On April 10, 1972, the Commissioner of Indian Affairs requested that the Associate Solicitor of Indian Affairs, Department of the Interior, determine whether BIA's interpretation of the act was correct. The Commissioner pointed out that, in implementing the BIA Housing Improvement Program, BIA made grants to Indian tribes and communities for the benefit of needy Indians. According to the Commissioner, this method was used in the interest of policy, efficiency, and economy, because (1) Indian tribes and communities assume responsibility for the management of their affairs, (2) the tribal governing bodies are in a position to know the needs of individual Indians, and (3) the issuance of one check, rather than several checks to cover various projects, reduces BIA's administrative burden.

On June 1, 1972, the Associate Solicitor advised the Commissioner that because the Congress had been informed that BIA makes grants to Indian tribes and organizations for the benefit of needy Indians and had, in effect, given its approval, he could see no reason why current funds could not continue to be handled in this manner. The Associate Solicitor stated that the printed appropriation hearings confirm that the Congress had been apprised that the allocation of funds to needy Indians was not always made directly by BIA to the individual concerned but sometimes was accomplished through tribal organizations.

We have reviewed the Associate Solicitor's opinion on this matter and, under the circumstances set forth in the opinion, we see no objection to BIA's practice of awarding grants to Indian tribes and organizations for the benefit of needy Indians, pursuant to the authority contained in the appropriation acts.

FEDERAL PERSONNEL LAWS

As a result of information developed during our review of selected contracts, questions arose regarding four contracts with Indian tribes and organizations for furnishing personal services to BIA during fiscal year 1971. These contracts appeared to have violated Federal personnel laws by creating an employer-employee relationship between the Government and the contract personnel.

In Federal Personnel Manual System Letter No. 300-8, dated December 12, 1967, the Civil Service Commission (CSC) provided guidance to Federal agencies in determining the legality of personal service contracts under the Federal personnel laws. CSC listed the following elements which it believed would result in unauthorized contracts or contract personnel practices circumventing the requirements and purposes of the personnel laws:

"* * * contracts which, when realistically viewed, contain all the following elements, each to any substantial degree, either in the terms of the contract, or in its performance, constitute the procurement of personal services proscribed by the personnel law:

"-Performance on-site

"-Principal tools and equipment furnished by the Government

"-Services are applied directly to integral effort of agencies or an organizational subpart in furtherance of assigned function or mission

"-Comparable services meeting comparable needs, are performed in the same or similar agencies using civil service personnel

"-The need for the type of service provided can reasonably be expected to last beyond one year

"-The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order:

"-To adequately protect the Government's interest or

"-To retain control of the function involved, or

"-To retain full personal responsibility for the function supported in a duly authorized Federal officer or employee."

CSC further stated that contracts containing these elements are proscribed unless an agency possesses a specific exception from the personnel laws to procure personal services by contract.

In our opinion, each of the elements listed by CSC were present to a substantial degree in four contracts awarded by BIA to Indian tribes and organizations during fiscal year 1971. (A description of the four contracts, which were issued in the form of purchase orders, is contained in the attachment to this letter.) The contracts were for services which are normally required to be obtained by appointment of civilian employees in accordance with applicable laws and regulations governing employment in the civil service. In each of the four contracts the designated contractor was to provide no definite end product, but acted merely as a conduit for employees, supplementing BIA's staff by furnishing personnel and in turn performing minimal administrative functions in connection with compensating those individuals.

The work required under the awards was performed under circumstances creating a relationship between Government personnel and contract employees which was tantamount to that of employer and employee, and which would thus require that the services be obtained in accordance with laws and regulations governing the appointment of civil service employees. CSC has indicated that for purposes of determining whether such a relationship exists, the extent to which the Government in fact supervises contract employees is critical. Extensive supervision by Government personnel did exist in the performance of the contracts. Further, the contracts by their terms, prescribe no task or end product to be provided, precluding even the possibility that the contractors might supervise the performance of their own employees. The fact of Government supervision appears to be an inevitable result of the contract terms themselves.

BIA advised us that its field offices were informed recently that contracts for purely personal services whereby persons hired by the contractor are to report to and be supervised by a BIA employee are not to be entered into. BIA also advised us that most contracts of this type have been terminated and that the individuals involved were made temporary or part-time BIA employees.

STAFF CEILINGS

On pages 21 and 22 of our July 7, 1972, report, we stated that if the four contracts created an employer-employee relationship between the Government and the contract personnel, BIA would have exceeded the staff ceilings established for its Aberdeen and Phoenix Area Offices by at least 29 and 28 positions, respectively. BIA advised us that three of the four contracts were terminated and that the other contract has been substantially revised to eliminate the employer-employee relationship which had existed.

Because we have determined that the four contracts created such a relationship, BIA, in fact, exceeded the staff ceilings established for these two area offices. We are unable to state whether the staff ceilings for the Aberdeen and Phoenix Area Offices were exceeded by more than the 29 and 28 positions because we reviewed only a sample of selected awards made by those area offices.

The 57 positions in the Aberdeen and Phoenix Area Offices did not, in themselves, result in exceeding BIA's total personnel ceiling. We are unable to state whether BIA's total personnel ceiling was exceeded, however, because our review was restricted to selected contracts issued by BIA's central office and three area offices.

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We believe that the Department of the Interior, Office of Management and Budget, and the Civil Service Commission should be advised of the matters set forth in our July 7, 1972, report and in this letter. Release of our report and the matters discussed in this letter will be made only after your agreement, or the agreement of the Chairman, Senate Committee on Interior and Insular Affairs, has been obtained or public announcement has been made concerning their contents.

The information contained in this letter is also being sent today to the Chairman, Senate Committee on Interior and Insular Affairs.

Sincerely yours,

Comptroller General
of the United States

The Honorable Wayne N. Aspinall
Chairman, Committee on Interior
and Insular Affairs
House of Representatives

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DESCRIPTION OF FISCAL YEAR 1971
BUREAU OF INDIAN AFFAIRS CONTRACTS
CREATING AN EMPLOYER-EMPLOYEE
RELATIONSHIP BETWEEN THE FEDERAL
GOVERNMENT AND THE CONTRACT PERSONNEL

Purchase Order #1H50-0100209 with the Salt
River Pima-Maricopa Community Council

On August 7, 1970, BIA issued a purchase order to the Salt River Pima-Maricopa Community Council for \$158,092 to provide services for a fiscal year 1971 project funded under Title I of the Elementary and Secondary Education Act of 1965 (ESEA) (20 U.S.C. 236). On March 1, 1971, the purchase order price was increased to \$161,942. The purpose of the purchase order was to establish a Title I coordination and administration staff at the BIA Phoenix Area Office to coordinate and evaluate all Title I education projects within the Phoenix Area.

Although the Community Council was to provide the personnel needed to perform the contractual services, BIA actually selected the contract employees. Similar coordination services had been previously performed under a contract between BIA and the Gila River Indian Community. For purposes of the contract with the Salt River Community Council, the coordination and administrative staff were transferred from the Gila River Community.

Council officials told us that, as a rule, the hiring of council employees was approved at council meetings but that this was not done in the case of the staff employed for the coordination project. The staff's compensation and other contract costs were developed by BIA, based on the prior year's experience under the contract with the Gila River Community. Also, the granting of a salary increase to certain staff employees by BIA without prior approval of the Community Council indicated that the employees were under BIA's control rather than the Community Council's control.

The performance of the services was under BIA's effective control. The contractor's staff was located at the BIA area office in Phoenix. The head of the staff, a Federal Program Coordinator, was regularly supervised by a BIA area office Education Officer. No regular accounting of the staff's activity was presented to the council. Support services for the contractor's staff were provided by the BIA area office which billed the Community Council for utilities, space and other services. Council officials stated that they had no active part in determining the service and supply needs of their contract employees. The council merely paid for the services as furnished and billed by BIA.

As provided under the contract, the BIA area office was to screen time and attendance reports and maintain personnel files on the contract employees. The Community Council's function was essentially limited to paying the salary and travel expenses and providing for fringe benefits.

Purchase Order #1H50-0100341 with
the White Mountain Apache Tribe

On September 4, 1970, BIA issued a purchase order to the White Mountain Apache Tribe in the amount of \$88,638 to provide personal services for a fiscal year 1971 "Indian Opportunity to Advance" education project funded under Title I of the ESEA. The purchase order price was subsequently reduced to \$84,540. The tribe was to provide 20 instructional and support personnel who would be employed at the BIA Phoenix Indian High School.

Although the purchase order called for the tribe to recruit and hire the contract employees, BIA selected the persons who were to perform the contractual services.

The principal of the Phoenix Indian High School, a BIA employee, told us that in fiscal year 1970 all school personnel engaged in educational projects under Title I of the ESEA had been hired by BIA as temporary employees. For fiscal year 1971, the principal had been directed by the Assistant Area Director for education to contract with a tribe for these services because of personnel ceiling limitations. For fiscal year 1972, BIA had planned to again obtain approval for temporary civil service employees to carry out the Title I projects.

The high school principal told us that BIA school employees supervised the contract employees and maintained their time and attendance records and personnel files. The principal stated that it would have been difficult for the tribe to perform these functions because the tribe was located over 200 miles from the high school.

The contract provided that the tribe was not to requisition materials, supplies, and equipment in support of the contract employees, and was not to pay travel expenses for contract employees. These functions apparently were performed by the high school. The tribe's principal function under the contract was the payment of salaries and fringe benefits for the contract employees.

Purchase Order #1H57-1100092 with
the Gila River Indian Community

On September 4, 1970, BIA issued a purchase order to the Gila River Indian Community for \$27,500 to provide services for a fiscal year 1971

project funded under Title I of ESEA. The Community was to assume the responsibility for full operation of the Casa Blanca Day School kindergarten.

The agreement called for the Gila River Indian Tribe to, among other things, hire personnel with the assistance and concurrence of the Administrative Manager of the BIA Pima Agency Office, provide specific services, and pay salaries in accordance with salary schedules furnished by BIA. BIA responsibilities included furnishing all equipment, supplies, materials, and timekeeping services for contract employees assigned to the project, establishing work requirements, and advising tribal officials when personnel employed were not performing satisfactorily.

The budget to operate the kindergarten was set by the BIA area office's Division of Education without participation by the tribe. A tribal official told us that the tribe's involvement in the contract was limited to paying salaries and operating expenses of the two employees required under the contract. BIA officials told us that the two contract employees were recruited by BIA and recommended to the tribe for employment. The principal of the BIA-operated Casa Blanca School was responsible for the supervision of the contract employees.

Purchase Order #1A01-0100971 with
the Cheyenne River Sioux Tribe

On July 31, 1970, BIA issued a purchase order to the Cheyenne River Sioux Tribe to provide services for a fiscal year 1971 project funded under Title I of the ESEA. The tribe was to provide 29 teachers, teacher aides, and other personnel, as well as supplies, and equipment to carry out an educational enrichment program for seven reservation schools. The purchase order was initially issued for \$183,605 but was increased to \$195,211.

This Title I program began in 1966 and except for one year, BIA has annually contracted with the tribe under the "Buy Indian Act" for the administration of the program. For fiscal year 1972, a similar program was planned.

Under the terms of the purchase order, the tribe was to have responsibility for the administration of the program. In actual practice, however, the tribe, through the Tribal Education Committee, merely monitored the program. Contract employees performing duties in connection with the program were screened and selected by BIA subject to the approval of the Tribal Education Committee. The committee asked BIA to aid in the final selection of personnel because BIA was more knowledgeable in the education area.

Contractor employees carried out their duties at BIA-operated schools, with regular BIA employees, performed the same functions, and reported to the BIA school principals. Timesheets for the contractor employees were maintained by BIA.