

Memorandum

B-114868.36-O.M.

DEC 7 1977

TO : Assistant Director, HRD - Robert Farabaugh

FROM : Senior Attorney, OGC - Robert H. Hunter, Jr. *RH*

SUBJECT: Additional Questions Concerning Indian Self-Determination (File B-114868.36)

This is in response to your memorandum dated September 16, 1977, in which you requested our response to questions concerning the provisions of the Indian Self-Determination and Education Assistance Act. As agreed in a telephone conversation with Thomas Schulz, an auditor on your staff, a response to the general question raised is included in our response to the first specific question. We discussed this memorandum with Justin P. Paterson, Assistant Solicitor, Procurement, General Law Division, Department of Interior, and he fully agrees with our position. We suggest that you request the views of the Bureau of Indian Affairs (BIA) program office and the Indian Health Service' (IHS) on these questions prior to making any conclusions or recommendations in your audit report.

QUESTION 1: Does the act specifically prohibit or inherently discourage the BIA and IHS from taking action, prior to a tribal request, to:

- a. identify the contractable programs and program portions available to each tribe and the level of service provided by these programs to the tribe;
- b. identify the resources and skills that are required and are available to operate each program;
- c. outline to the tribe the training and technical assistance available under the Act to help the tribes develop the needed resources and skills; and
- d. provide for each tribe's consideration a plan for the phased-in assumption of control by the tribe, beginning with those programs requiring the least resources and expertise and progressing to the more complex, as tribal capabilities are increased.

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ANSWER: No.

ANALYSIS:

Mr. Schulz informed us that BIA prepared and distributed guidelines for tribes to use when requesting contracts or grants under the Act. However, the auditors found that BIA and IHS are reluctant to engage in any of the activities listed above, prior to receiving a tribal request. Mr. Schulz thinks that this reluctance may be based on the agency's belief that undertaking any of those activities would place them in a position of advocating the contracting out of programs and is therefore contrary to those provisions of the Act that provide tribes with the initiative of requesting contracts or grants. As you know, both the Act and the regulations promulgated by BIA and IHS clearly state that Indian tribes have the initiative in making requests for contracts and the concept of Indian self-determination includes a tribal decision not to request a contract. We recognize that the activities listed above are not mandated by the Act or the regulations. However, undertaking such actions in anticipation of the possibility of receiving requests for contracts is consistent with the basic intent of the Act to achieve greater Indian self-determination. In addition, the statements of policy contained in both sets of regulations provide general authority for BIA and IHS to engage in the kinds of activities you describe. The BIA policy statement provides in pertinent part as follows:

"(c) It is the policy of the Bureau to facilitate the efforts of Indian tribes to plan, conduct, and administer programs, or portions thereof, which the Bureau is authorized to administer for the benefit of Indians and to facilitate the coordination of all Federal and other programs on Indian reservation.

"(d) It is the policy of the Bureau to continually encourage Indian tribes to become increasingly knowledgeable about Bureau programs and the opportunities Indian tribes have regarding them; however, it is the policy of the Bureau to leave to Indian tribes the initiative in making requests for contracts and

to regard self-determination as including the decision of an Indian tribe not to request contracts.

"(e) It is the policy of the Bureau not to impose sanctions on Indian tribes with regard to contracting or not contracting; however, the special resources made available to facilitate the efforts of those Indian tribes which do wish to contract should be make known to all tribes, as should the current realities of funding and Federal personnel limitations." (Emphasis added.) 25 C.F.R. §271.4(c), (d), and (e). See 42 C.F.R. §36.201(a)(3), (4), and (5) for comparable IHS provisions.

We do not believe that engaging in any of these activities could be construed as a violation of the Act provided, of course, that in their contacts with the tribes, BIA and IHS make it clear that they are providing the information and assistance to the tribes to better enable these organizations to make an informed decision on whether or not to request a contract or grant.

We would like to point out that BIA's regulations specifically authorize the provision of technical assistance to tribal organizations at the request of a tribe. 25 C.F.R. §271.17. We do not regard this regulation as precluding BIA's authority to undertake the types of action you describe prior to receiving a tribal request either for assistance or for a contract.

QUESTION 2: Are HEW's and Interior's responsibilities to achieve the purpose of Title I of the Act contingent upon receiving a request for a contract or grant under sections 102-104 of the Act?

ANSWER: No.

ANALYSIS:

The purpose of title I is the

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" * * * establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 C.F.R. §271.4(b).

Ultimately the Act contemplates that this purpose will be achieved when Indian tribes are in the position of administering contracts and grants for programs on their reservations. However, the statements of policy contained in the regulations recognize that many tribes lack the knowledge and expertise to make a reasoned decision whether to request a contract or to administer a contract if an application is granted. As evidenced by the underlined portions of the statement quoted in our answer to Question 1, these policy statements contemplate that BIA and IHS will assume an active role in providing assistance to tribes to enable them to make reasoned decisions and authorize these agencies to provide such assistance. Consequently, we believe that the responsibilities of these agencies is not contingent upon receiving tribal requests.

cc: Mr. Pierson, OGC
Mr. Schulz, HRD
Ms. Finley, OGC
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