



FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 17, 1993

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1993-12

Phillip Martin, Chief
Mississippi Band of Choctaw Indians
Tribal Office Building
Post Office Box 6010
Philadelphia, Mississippi 39350

Dear Mr. Martin:

This refers to your June 28, and July 27, 1993, letters concerning application of the Federal Election Campaign Act of 1971 ("the Act"), as amended, to a proposed program of contributions which the Mississippi Band of Choctaw Indians wishes to undertake.

You state that you are the elected Chief of the Mississippi Band of Choctaw Indians (the "Tribe"). The Tribe is a non-corporate entity organized in accordance with a constitution approved by the Secretary of the Interior pursuant to 25 U.S.C. 476. You state the Tribe wishes to pursue an active program of making contributions to Federal candidates. However, you are aware that 2 U.S.C. 441c prevents Federal contractors from making contributions for Federal elections. Because the Tribe has entered into various agreements with the Federal Government, you are concerned that this prohibition may apply to the Tribe. You describe three separate circumstances that give rise to your concerns.

First, you state that pursuant to the Indian Self-Determination and Education Assistance Act (the "Self-Determination Act") found at 25 U.S.C. 450 et seq., the Tribe has entered into various "self-determination contracts" with the Department of the Interior. You describe these contracts as providing Federal funds to the Tribe and authorizing the Tribe to plan, conduct, and administer programs that would otherwise be provided by an agency of the Federal Government for the benefit of the Tribe. You state that these contracts are not procurement contracts and, as provided in 25 U.S.C. 450j(a), are specifically exempted from the Federal Acquisition Regulations contained in Title 41 of the Code of Federal Regulations.

Second, you state that the Tribe administers discretionary grants from various Federal agencies (for example, Job Training Partnership Act funds from the Department of Labor, a Vocational Education grant from the U.S. Department of Education, and the like) made available, not under the auspices of the Self-Determination Act, but because of the Tribe's status as a government entity.

Finally, you state that the Tribe has chartered several unincorporated commercial ventures that operate as subordinate economic enterprises of the Tribe. You state that some of these Tribal economic enterprise have, in the past, and may, in the future, enter into contracts with a department or agency of the United States for the provision to the United States of goods or services.^{1/}

You state that funds from self-determination contracts and Federal grants are not commingled with other Tribal funds.^{2/} Further, funds from the Tribal economic enterprises are also separately maintained for each enterprise, and each enterprise is required to have an annual independent audit conducted and to present the Tribal Courts with a full report of its operations and financial records. You state that in situations in which an enterprise has surplus funds that are not needed for operation or expansion of the commercial business of the enterprise, the enterprise is expected to transfer such funds to the Tribe. However, if necessary, you state that the Tribe could establish policies and procedures to ensure that no enterprise funds received as a result of a Federal contract are ever transferred to the general unrestricted Tribal funds from which political contributions would be made.

Under 2 U.S.C. 441c, it is unlawful for a Federal contractor "directly or indirectly to make any contribution of money or other things of value or to promise expressly or impliedly to make any such contribution to any political party, committee or candidate for public office..." Commission regulations indicate that the prohibition bans contributions to Federal candidates and Federal political committees, but does not prohibit contributions in state and local elections. See 11 CFR 115.2. This prohibition extends from the commencement of the contract negotiations until the completion of the contract performance or the termination of negotiations. Id. Commission regulations at 11 CFR 115.1(a) define the term 'Federal contractor', in part, to mean a person who:

- (1) Enters into any contract with the United States or any department or agency thereof either for-
 - (i) The rendition of personal services; or
 - (ii) Furnishing any material, supplies, or equipment; or
 - (iii) Selling any land or buildings;
- (2) If the payment for the performance of the contract or payment for the material, supplies, equipment, land, or building is to be made in whole or in part from funds appropriated by the Congress.

Under 11 CFR 115.2(c) of the regulations, the term "contract" includes:

- (1) A sole source, negotiated, or advertised procurement conducted by the United States or any of its agencies;

- (2) A written (except as otherwise authorized) contract, between any person and the United States or any of its departments or agencies, for the furnishing of personal property, real property, or personal services; and
- (3) Any modification of a contract.

In past advisory opinions and enforcement cases, the Commission has determined that an unincorporated tribal entity can be considered a "person" under the Act and thus subject to the various contribution prohibitions and limitations. See Advisory Opinion 1978-51 and Matters Under Review 2465 and 2302. The Tribe is therefore subject to the provisions of 2 U.S.C 441c and would be prohibited from making contributions if any of the three types of agreements presented in your request are found to fall within the definition of contract, as presented in Commission regulations. Each type of agreement is examined in turn, dealing first with the grant agreement between the Tribe and the Federal Government.

Federal Grants to the Tribe

The prohibitions of section 441c explicitly refer to Federal contractors entering into contracts with the Federal Government. While grant agreements, including the example provided in your request, create obligations of a quasi-contractual nature, there are distinctions between grants and contracts, particularly procurement contracts, recognized in other provisions of the U.S. Code.^{3/} These distinctions are based on the public purpose of the agreement and whether the U.S. Government directly benefits from the agreement itself. See 31 U.S.C. 6303 et seq.^{4/}

The grant agreement included in your request typifies the public purpose activity which is the usual subject of grant agreements. It concerns the operation of a Tribal Child Welfare program and is authorized by the Indian Child Welfare Act of 1978. The Commission concludes that such a grant agreement does not fall within the definition of contract as presented in section 115.1.

Self-determination Contracts

The request correctly notes that self-determination contracts are not procurement contracts because of their exemption from the Federal Acquisition Regulations of Title 41.^{5/} Therefore, section 115.2(c)(1) relating to procurement contracts would not apply.

However, section 115.2(c)(2) expands the meaning of contract for purposes of section 441c beyond only procurement contracts. The fact that parts of Title 41 do not apply to these agreements, does not change the fact that the agreements are in the form of contracts. This holds true for the two examples provided in the request, one a self- determination contract for the administration of law enforcement programs, the other a similar agreement for the operation of an agricultural program.^{6/} These agreements are styled as contracts.

Use of the term "contract" on the form used to implement the Self-Determination Act does not necessarily decide the issue. Instead, the form must be reviewed with regard to the substance of the agreement. The Commission notes that the content of the agreement is a public purpose no different than the previously examined grant agreement.^{7/} Further, as the request notes, these agreements concern the providing of Governmental services which the Bureau of Indian Affairs

is ordinarily under an obligation to provide itself but now is under a statutory obligation to delegate to the Tribe.^{8/} Additionally, these agreements in a sense do not actually involve the "furnishing of personal property, real property, or personal services" by the Tribe to "the United States or any of its departments or agencies." Services are being delivered to the Tribe or Tribal members. See 11 CFR 115.1(c)(2).^{9/}

The Commission believes these agreements, statutory creations unique to Indian Tribes, were not contemplated as subject to the prohibitions of section 441c. Accordingly, as with the grant agreements, the Commission concludes that, notwithstanding the contractual elements of the agreements, self-determination contracts of the same type as presented in the request do not fall within the regulatory description of a contract for purposes of 2 U.S.C. 441c.

Procurement Contract with the Federal Government

The final class of agreements described in your request, unlike the first two, falls squarely within definition of contract in section 115.1 and the prohibitions of section 441c. The example you have provided in your request, an agreement to sell posters and prints to the Bureau of Indian Affairs, is a standard or typical procurement contract as described in 11 CFR 115.2(c)(1). Accordingly, section 441c prohibits the Tribe, as a Federal contractor, from making contributions to a Federal candidate during the term of the agreement.^{10/} The Commission notes that the Act and Commission regulations do not permit Federal contractors to segregate the proceeds of their Federal contracts from other funds as a means to avoid the prohibitions of section 441c.

The Commission further notes, however, that 11 CFR 115.6 permits the employees, officers, or individual members of an unincorporated association, or other group or organization which is a Federal contractor, to make otherwise lawful contributions from their own personal assets,^{11/} or to form a nonconnected political committee.^{12/} See Advisory Opinions 1985-23, 1984-10, and 1984-12.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Scott E. Thomas
Chairman

Enclosures (AOs 1985-23, 1984-12, 1984-10 and 1978-51)

ENDNOTES

1/ In your July 27, 1993 supplement you provide four contracts and agreements that illustrate the three separate categories of agreements described in your request.

Your request includes two contracts that were entered into pursuant to the Self-Determination Act. These are agreements with the Bureau of Indian Affairs which allow the Tribe to administer a "Law Enforcement Program" to maintain a police force on Tribal territories and to administer an "Agriculture (Soil & Moisture) Program" for the benefit of the Tribe.

A third agreement, a Federal grant agreement for the operation of a Tribal Children Services Program, is part of the Indian Child Welfare Act of 1978. See 25 U.S.C. 1901. It could be seen as illustrative of the type of grant agreements entered into by the Tribe.

Finally, the July supplement includes a procurement contract between the Bureau of Indian Affairs and First American Printing & Direct Mail, an unincorporated economic enterprise of the Tribe. The contract is for the production and supply to the Bureau of Indian Affairs of several types of posters and prints.

2/ Your request also states that the Tribe is required to provide the appropriate Federal department, on an annual basis, with a full accounting of Federal funds expended pursuant to self-determination contracts and Federal grants.

3/ Especially in the remedies available to the parties in a grant agreement, the law of Federal assistance is grounded in contract law. See M. Callaghan, Federal Grants and Cooperative Agreements: Law Policy, and Practice 30 (1980). However, for the reasons established below, the Commission views grants as distinct from contracts for the purpose of section 441c.

4/ Under Title 31, grant agreements are designed for use in situations where the Federal Government seeks to "carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease or barter) property or services for the direct benefit or use of the United States Government." 31 U.S.C. 6304 and 6304. Situations of acquisition for direct benefit, by contrast, require the use of procurement contracts. 31 U.S.C. 6301.

5/ According to 25 U.S.C. 450j, except for construction contracts, "the Office of Federal Procurement Policy Act (88 Stat. 796; 41 U.S.C. 401 et seq.) and Federal acquisition regulations promulgated thereunder shall not apply to self-determination contracts."

Some general provisions of Title 41 that relate to public contracts do, however, still apply to self-determination contracts. See 26 U.S.C. 450e and 450m-1 (relating to contract dispute resolution and labor standards) and 41 U.S.C 50(the Anti-Kickback Act of 1986.)

6/ See footnote one above.

7/ Under 45 U.S.C. 450e-1, the Department of the Interior may ignore the provisions of Chapter 63 of Title 31 when entering into self-determination contracts and may choose whatever form of agreement it wishes when acting under the Self-Determination Act. However, Title 31 still provides a means to portray the substantive distinctions between grant agreements and contracts.

8/ Under 25 U.S.C. 450f, the Department of the Interior may reject in only limited circumstances a self-determination contract proposed by a Tribe. The burden is on the Federal Government to

justify the denial and its decision may be appealed. Furthermore, if a particular contract is rejected, the Department of the Interior must assist the tribe in overcoming whatever situations led to the rejection. See 25 U.S.C. 450f and 25 CFR 271.15.

9/ Once again one can look at Title 31 for illustrative purposes. A difference between grant agreements and procurement contracts is whether the government is acquiring services or property for direct benefit of the Federal Government. See footnote four.

10/ The Commission assumes for purposes of this opinion that the funds to carry out all the contracts described in your request will come from funds appropriated by the Congress.

11/ The Tribe may not, however, give funds to individual Tribal members for the purpose of making such contributions since this would violate 2 U.S.C. 441f. See Matters Under Review 2465 and 2302.

12/ In the current circumstances you have described involving unincorporated Tribal enterprises with government contracts, the Tribe does not have the option of forming a political committee. However, Tribal members acting in their individual capacity could form their own political committee unconnected to the Tribe itself or its enterprises. Such a committee, however, would have to be independent of the Tribe and receive no support, direct or indirect, from Tribal resources or funds. See 11 CFR 100.6.