



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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CERTIFIED MAIL  
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ADVISORY OPINION 2005-01

C. Bryant Rogers, Esq.  
Roth, VanAmberg, Rogers, Ortiz & Yepa, LLP.  
P.O. Box 1447  
Santa Fe, NM 87504-1447

Dear Mr. Rogers:

We are responding to your advisory opinion request regarding the possible Federal contractor status of the Mississippi Band of Choctaw Indians (“the Tribe”), a Federally recognized Indian tribe, under the Federal Election Campaign Act of 1971, as amended (“the Act”), and Commission regulations. The Tribe owns and controls IKBI, Inc. (“IKBI”), a Tribal corporation that intends to become a Federal contractor.

The facts indicate that IKBI can be treated as a separate entity from the Tribe and that the commercial activity of IKBI as a Federal contractor can be separated from the Tribe’s political activities. IKBI’s status as a Federal contractor will not make the Tribe a Federal contractor for purposes of the Act, and will not affect the Tribe’s ability to make contributions to Federal candidates, political parties and political committees.

***Background***

The facts of this opinion are presented in your letter dated January 6, 2005.

The Tribe is a non-corporate entity organized in accordance with a constitution approved in 1975 by the Secretary of the Interior pursuant to 25 U.S.C. 476. *See* Advisory Opinion 1993-12. The Tribal constitution authorizes the creation of “organizations, including public and private corporations, for any lawful purpose, which may be non-profit or profit making, and to regulate the activities of such organizations by ordinance.” Tribal Constitution, Article VIII, section 1(j).

The Tribe established and chartered IKBI in June 2004 as a for-profit Tribal “separate corporation.” The Tribe provided approximately \$ 468,000 in initial and supplemental capitalization to IKBI. The purpose of IKBI is to “compete for and perform construction contracts and any other lawful purpose consistent with [its] charter.” IKBI Charter, Article VII, section A.

IKBI is governed by its board of directors, which is elected by its sole shareholder, the Choctaw Development Enterprise (“CDE”), acting on behalf of the Tribe. *Id.* at section B. CDE, in turn, is operated and managed by its five-member enterprise board, which is appointed by the Tribal Council with Tribal Chief and the Tribal Secretary – Treasurer serving as the enterprise board’s Chairman and Treasurer, respectively.<sup>1</sup>

IKBI’s board of directors manages the business and affairs of the corporation; however, the Tribal Council retains the authority to issue shares of the IKBI stock. *Id.* at section C(9). Board members must be members of the Tribe, but no member of the Tribal Council may serve on the board. *Id.* at section(C)(1). The board has the authority to waive the sovereign immunity of the corporation, but not the sovereign immunity of the Tribe or any other Tribal entity or enterprise. *Id.* at section C(9). The board elects and removes officers of the corporation and authorizes the officers to enter into contracts on the corporation’s behalf. *Id.* at sections D(1) and (3) and section F.

IKBI has its own tax identification number separate from that of the Tribe. It maintains office space and records separate from the Tribe and has its own bank account separate from the Tribe. You state that IKBI leases or owns its own property. It has its own corporate employees and personnel policies, and it provides employee benefits separate from the Tribe. Finally, IKBI has separate legal counsel.

IKBI is a construction company and most of its planned work consists of construction projects for the U. S. Government or Federal agencies. IKBI intends to seek both sole source and competitive bid contracts with various Federal agencies, including the General Services Administration and the Federal Aviation Administration. These contracts will be funded with Federally appropriated funds.

For all its construction projects, both Federal and non-Federal, the owner/purchaser will require IKBI to obtain a standard performance bond from a reputable bonding company and, in some instances, a bid bond and payment bond as well. As a condition for issuing the bonds, the bonding agent will require the Tribe, (through CDE as the sole stockholder of IKBI), to sign an “agreement of indemnity.” This obligates the Tribe (through CDE) to act as co-indemnitor (along with IKBI) for any losses and liabilities on the bonds. As a startup company, IKBI has neither sufficient in-house financial resources nor a sufficient proven construction track record to enable it to obtain the requisite bonds on its own.

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<sup>1</sup> CDE was created in November 1997, to engage in residential, commercial and institutional construction. CDE is not a “separate legal entity” but is an “arm of the Tribe.” *See* Tribal ordinance No. 56.

### ***Question Presented***

*Will the Tribe's relationship to IKBI, including its role as co-indemnitor on bonds related to Federal contracts, make it a Federal contractor for purposes of the Act and Commission regulations?*

### ***Legal Analysis and Conclusion***

No, because of IKBI's distinct and separate identity from the Tribe, the status of IKBI as a Federal contractor, even within the context of the indemnification agreement, does not make the Tribe a Federal contractor.

The term "person" as defined in the Act includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government. 2 U.S.C. 431(11). The Tribe, which is an unincorporated entity, is a "person" under the Act. *See* Advisory Opinion 1993-12. As a corporation, IKBI is also a "person" under the Act. 2 U.S.C. 431(11).

Under 2 U.S.C. 441c, it is unlawful for any person who is 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." *See also* 11 CFR 115.2(a). This prohibition extends from the commencement of the contract negotiations until the completion of the contract performance or the termination of negotiations. 11 CFR 115.1(b), 115.2(b).

Under 2 U.S.C. 441c(a)(1) and Commission regulations at 11 CFR 115.1(a), a "Federal contractor" is 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 115.1(c), 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.

The request describes IKBI's proposed transactions with the Federal governments as "contracts." For purposes of this advisory opinion the Commission assumes, therefore, that these are the type of agreements described in 11 CFR 115.1(c). When IKBI qualifies as a Federal contractor, 2 U.S.C. 441c and 11 CFR 115.2 will prohibit it from making contributions. This advisory opinion considers whether that prohibition extends to the Tribe as well.

In two advisory opinions the Commission has considered whether the Federal contractor status of subordinate tribal enterprises limits the ability of Indian tribes to make contributions. *See* Advisory Opinions 1999-32 and 1993-12. The Commission concluded that if circumstances demonstrate that the tribal enterprise has a distinct and separate identity from the Indian tribe itself, then the Act does not prohibit a tribe from making contributions because of the Federal contractor status of the tribal enterprise. *See* Advisory Opinion 1999-32.

The facts in this request are substantially similar to the facts considered in Advisory Opinion 1999-32. As in Advisory Opinion 1999-32, circumstances indicate that IKBI is a separate and distinct entity from the Tribe. These include the separate incorporation of IKBI, the separate leasing and ownership of property, the fact that no member of the Tribal council may serve on the IKBI board, and that IKBI has a separate legal counsel, bank account, tax identification number and separate employees, personnel and benefit policies from the Tribe. Further, as in Advisory Opinion 1999-32, funds from the Tribal enterprise that is a Federal contractor are not intermingled with other Tribal funds. The Commission notes that revenues from IKBI may not be used to make contributions to Federal candidates or political committees.

Accordingly, when IKBI qualifies as a Federal contractor, its status as Federal contractor does not confer Federal contractor status on the Tribe and therefore will not affect the Tribe's political activities under 2 U.S.C. 441c. The Tribe may continue to make contributions as a "person" under the Act subject to the condition that revenues from IKBI may not be used to fund these contributions. *See* Advisory Opinion 1999-32.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a

conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Scott E. Thomas  
Chairman

Enclosures (Advisory Opinions 1999-32 and 1993-12)