



*MILLE LACS BAND OF CHIPPEWA INDIANS*  
*Judicial Branch of Tribal Government*

Opinion of the Solicitor General

15-0SG-84

TO: A.J. Nickaboine, Commissioner of Education  
FROM: Jay Kanassatega, Solicitor General  
SUBJECT: Legality Review of Proposed Johnson-O'Malley Sub-Contract

This responds to your request for an opinion on the question of a legal review of a proposed contractual document for the provision of services to Indian children under the Johnson-O'Malley program.

Your memorandum raises questions about the format of the contract document, who are the legal signatories and what are basic problems that may arise during the performance of this contract if entered into as is. The following is submitted as a binding opinion pursuant to Band Statute 1024-MLC-1, Section 19.01.

A contract is an agreement between two or more persons in which one party promises to do a certain thing in exchange for a promise by the other party or parties to do another certain thing. By entering into the contract, each party obtains the power to enforce the terms of the contract through court action if necessary. In addition, each party gets the power to obtain a remedy for the failure of the other party to perform the requirements of the contract. Each party also takes on the duty to comply with the requirements of the contract and risks legal consequences for failure to comply with or perform the requirements of the contract.

The essentials of a contract are competent parties, subject-matter, a legal consideration, mutuality of agreement, and mutuality of an obligation. The writing of a contract contains the agreement of parties, with terms and conditions and which services as a proof of the obligation.

The type of contract which is at issue here is a sub-contract. This is a contract sub-ordinate to another contract, made or intended to be made between the contracting parties, on one part, or some of them, and a third party (i.e. sub-contractor). Here, the Consolidated Nay-Ah-Shing School Board has contracted for the provision of services to meet the special and unique educational needs of eligible Mille Lacs Band enrollees attending public schools of the State of Minnesota, and in turn seeks to engage several public school districts to perform the whole of the original contract. The agreement of the public school board to perform this task makes them a subcontractor. In this case, the Consolidated School Board

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must determine whether they seek the public school district to perform the original contract en toto or in part in exchange for monetary compensation to which the Consolidated School Board has previously consented to perform.

A review of the proposed sub-contract agreement reveals minimal obligation on behalf of the public school district in exchange for full monetary compensation. This is primarily based upon the Consolidated School Board's apparent desire to be fully accountable for all provisions of the original contract with the Bureau of Indian Affairs. Should the present proposed agreement remain unchanged, I strongly recommend you establish procedures for compliance monitoring of contracted services since the Bureau of Indian Affairs will hold you accountable.

However, if it is the intention of the Consolidated School Board to be relieved of all obligations under the contract, I strongly recommend the inclusion of all contract provisions into the sub-contract agreement. To do otherwise invites legal difficulty unnecessarily and questions the ability of the Board to perform its legal duty under Band law. The following are the contractual compliance regulations {25 CFR 273} which the Board has consented for the operation of this program.

All reasonable steps were taken to obtain maximum Indian participation in the development and approval of this application and, will be taken in the implementation of the programs herein proposed {273.13};

1. All students counted for services eligible as defined in PL.L. 93-638 {273.12};
2. The IEC(s) for this application is vested with all Powers and Duties as outlined by regulations and has participated fully in the planning and development of this application {273.16};
3. The application as approved by the IEC will not be changed or revised without the written approval of the IEC {273.17};
4. The education facilities where the programs are to be conducted shall be open to visits and consultations {273.18};
5. The contract funds applied for shall supplement, and not supplant, other funds and that use of these funds will not result in a decrease of other funds {273.34};
6. State, Local and other Federal funds shall be used prior to the use of JOM funds for the provision of supplemental services to Indian children {273.34 and 273.41};
7. Indian preference will be exercised in all hiring, training, and subcontracting in programs under this application {273.45};

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8. The required public liability insurance coverage will be in effect covering programs contracted {27}.45 and 273.46};
9. The required recordkeeping system covering all required topics will be maintained for programs applied for with this application {273.47};
10. Access to contract records and documents will be allowed to authorized representatives of the Comptroller General and the Secretary of the Interior {273.48};
11. Access to all non-confidential records will be allowed to the Indian people which the contract affects and other interested public {273.49};
12. A detailed annual report covering all required topics will be submitted within {90} days following the end of each contract year {273.50};
13. The minutes of the IEC(s) meeting(s) approving this application are on file in contractor's office;
14. Copies of this application, including the Education Plan and Budget, have been given to each IEC member;
15. A current set of Indian Education Committee by-laws which meet the criteria set forth in 25 CFR 273, b {b} has been given to IEC members;
16. A current, updated inventory of government property assigned to the project is on file for review;
17. A current bank signature card(s) and bank agreements are completed for this project;
18. The tribal resolution of request to contract is attached to this application;
19. Procedures established for hearing and responding to grievances for Indian students, parents, community members and tribal representatives are on file for review;
20. Job descriptions of employees working for the program are on file for review;
21. Subcontracts are on file for review and will be submitted to the Bureau of Indian Affairs, if necessary.

The next issue which you raise concerns vestiture of the legal authority to enter into this contract. Band Statute 1040-MLC-18, Section 2{5} confers upon the Consolidated School Board the power to prepare and authorize educational grants and contracts. Clearly, the subject-matter of this opinion is a grant/contract.

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The term "authorize" legally means to empower, to give a right or authority to act. Also, to permit a thing to be done in the future. It has a mandatory effect or meaning, implying a direction to act.

Notwithstanding this grant of right, the Consolidated Nay-Ah-Shing School Board was chartered as an independent sub-division of the Executive Branch {Band Statute 1040-MLC-18, Section 1}. Another chartered entity, the Public Works Commission is independant of the tribal government {Band Statute 1010-MLC-6, Section 1}. Due to this distinction, it is my opinion that the following entities/persons must be signatory to any sub-contract agreement:

- 1}. Commissioner of Educational Affairs
- 2}. Consolidated Nay-Ah-Shing School Board
- 3}. Band Assembly
- 4}. Solicitor General

Therefore, after the review presented in the preceeding analysis and review of the proposed contract, it is my opinion that this sub-contract can not be utilized as presently drafted because of legal deficiencies in the transfer of limited obligations in exchange for full monetary compensation to exterior public school boards. This would result in the School Board's inability to enforce the terms of the basic contract upon the sub-contractor and expose the Band to full liability in the event of a funding of contract deficiency by the Bureau of Indian Affairs, with no apparent avenue of remedy other than a withhold of future funds to the detriment of Indian children.

The foregoing opinion shall be legally binding unless annulled by the Court of Central Jurisdiction or amended by the Band Assembly {Band Statute 1024-MLC-3, Section 19.01}. Should you require further clarification, feel free to contact me.



THE SOLICITOR GENERAL

Dated at Vineland, this twentieth day of July, 1984.

OFFICIAL SEAL OF THE BAND