U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 11, 1988

Honorable Daniel K. Inouye
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Inouye:

In a letter dated October 27, 1987, I informed the Select Committee on Indian Affairs of the Department's objections to S. 1703, the "Indian Self-Determination and Education Assistance Act Amendments of 1987." My recent letter of January 26, 1988 expanded upon those objections insofar as they concerned application of the Indian Civil Rights Act to self-determination programs. Further comment upon section 201(c) of the Committee amendment to S. 1703 is also warranted, particularly in light of an amendment to section 103(c) of the Indian Self-Determination and Education Assistance Act enacted as part of the Continuing Resolution for fiscal year 1988. In fact, the need for section 201(c) of the Committee amendment to S. 1703 largely appears to have been obviated.

As it now reads, amended section 103(c) of the Indian Self-Determination and Education Assistance Act ("the Act") provides as follows:

> The Secretary of Health and Human Services is authorized to require any tribe requesting that he enter into a contract pursuant to the provisions of this subchapter to obtain adequate liability insurance: Provided, however, That each such policy of insurance shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the tribe's sovereign immunity from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage and limits of the policy of insurance. For purposes of section 224 of the Public Health Service Act of July 1, 1944 (42 U.S.C. 233(a)), as amended by section 4 of the Act of December 31, 1970 (84 Stat. 1870), with respect to claims for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, a tribal organization or Indian

EXHIBIT 1

contractor carrying out a contract, grant agreement, or cooperative agreement under sections 103 or 104(b) of this Act is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees (including those acting on behalf of the organization or contractor as provided in section 2671 of title 28) are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement.[1]

This new language will allow persons injured by certain acts of medical negligence to pursue a damage remedy against the United States under the Federal Tort Claims Act ("FTCA") in place of any remedy they may otherwise have had against a physician or health care provider. As you know, such a result had been a fundamental basis for our original opposition to S. 1703.[2]

In light of the above changes to section 103(c) of the Act, section 201(c) of the Committee amendment doubtless will be eliminated or amended further. We wish to express a concern which we hope will be taken into account in that process.[3]

As the Committee has recognized, whatever the merits of providing FTCA protection to Indian tribes and their employees, that protection should not extend to private physicians or health care providers who may be providing contract health care under a self-determination contract to a tribal organization -- so-called "indirect health care providers." See S. Rep. No. 274, 100th Cong., 1st Sess. 27 (Dec. 22, 1987). It follows that the term "Indian contractor," as now contained in section 103(c) of the Act, should not be construed to include such private physicians

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[1] The highlighted language was added by the Continuing Resolution.

[2] Section 201(a) of an unamended S. 1703 essentially would have accomplished the identical result by adding similar language to a renumbered section 102(c) of the Act.

[3] We continue to be opposed to the notion that the Indian tribes should be singled out for special treatment by absolving them from responsibility for their negligence in administering self-determination health care contracts. Recognizing, however, that amendments to section 103 of the Act are a fait accompli, we offer the following as a suggestion to ensure that this new language is applied in a manner consistent with our previously expressed concern that third-party health care providers who contract with the Indian tribes not be included within the scope of persons now protected by the FTCA under section 103(c) of the Act.

and health care providers. And, in a letter to you dated November 18, 1987, Mr. Lloyd B. Miller, writing on behalf of "many Indian tribes and tribal organizations," specifically disavowed any intent or desire to bring these subcontractors within the FTCA.[4] Nor would such a course of action be advisable from the standpoint of seeking to deter medical malpractice.[5]

Although we seem to be in agreement on this basic point, our common understanding of the properly limited scope of "Indian contractor" is not self-evident from the Act, as amended by the Continuing Resolution. To our knowledge, the term "Indian contractor" is nowhere defined in the Act. Unfortunately, it is our experience that in cases where the deep pocket of the federal government is involved, any ambiguity in the law all too often is exploited in litigation to the detriment of the United States.

Accordingly, we strongly recommend that section 201(c) of the Committee amendment to S. 1703 be replaced with language which would simply delete the reference to "Indian contractors" in section 103(c) of the Indian Self-Determination and Education Assistance Act added by the Continuing Resolution. This clarification should allow section 103(c) to be applied with a minimum of interpretive problems.

If, instead, the Committee intends to ignore the recent amendment to section 103(c) in favor of the more sweeping changes presently contained in section 201 of the Committee amendment, a different aspect of providing FTCA protection to tribal

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[4] It should be noted that, for sound reasons rooted in public policy, the FTCA expressly does not apply to contractors of the United States. 28 U.S.C. 2671 ("Federal agency . . . does not include any contractor of the United States.") Thus, the inclusion of indirect health care providers within the term "Indian contractor" would not only be inconsistent with Congress's clearly expressed intent that the FTCA not cover independent government contractors, but would also unjustifiably give favored treatment to some such contractors but not others.

[5] Our concern that the United States not accept responsibility for professional negligence unless it is accompanied by an adequate opportunity to control and supervise professional conduct is doubly important in this context. However limited may be the federal government's ability to control and supervise the tribes themselves, it far exceeds in scope any influence the federal government may exert over the medical practice of persons who independently contract with the tribes.

contractors is implicated.[6] Although the report language discussing section 201 is confined to the area of medical malpractice, section 201 of the Committee amendment would extend the FTCA's coverage to all tribal negligence associated with carrying out virtually any self-determination contract, grant agreement, or cooperative agreement -- not just those associated with the provision of health care.

Whatever the particular merits of accepting federal responsibility for tribal medical malpractice, no need has been demonstrated for extending that indemnification to tribal conduct associated with the various other activities performed or capable of being performed by way of self-determination contracts or agreements. As presently structured in section 201, the United States will end up accepting financial responsibility for any number of everyday accidents that it had no hand in causing and that have no connection whatsoever to its obligations to the Indian tribes.[7] It is imperative, in this regard that, as it is now, section 103(c) of the Act (becoming section 102(c) if S. 1703 is enacted) clearly be limited to medical malpractice claims.

Aside from the above suggestions, and those expressed earlier, we continue to have fundamental concerns with other provisions of the Committee amendment to S. 1703. Among other concerns, we object to proposed section 110 of the Act as contained in section 206 of the Committee amendment to S. 1703.

Proposed section 110(a) would grant jurisdiction to the United States district courts over any civil action or claim arising under the Act, expressly including any claim for money damages arising under a self-determination contract. In other words, despite applying the Contract Disputes Act to self-determination contracts for all other purposes, tribal contractors are to be exempted from the requirements of that Act

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[6] Section 201 of the Committee amendment does not contain the ambiguous reference to "Indian contractors," and the report accompanying S. 1703 makes it clear that private physicians and health care providers are not to be extended the protection of the FTCA.

[7] The largest source of non-medical malpractice liability exposure will be automobile accidents, slip and fall cases, and similar "garden variety" type torts. We simply do not understand why the United States should accept financial responsibility for automobile accidents and similar everyday torts involving tribal employees.

when it comes to seeking judicial review of contracting officers' decisions and decisions of agency boards of contract appeals.[8]

Instead of a trial de novo in the United States Claims Court, or before an agency board of contract appeals (41 U.S.C. §§ 606 & 609(a)) -- both of which possess vast expertise in the law applicable to government contract claims[9] -- a tribal contractor would be allowed to challenge an adverse contracting officer's decision in a United States district court that likely has little or no experience with government contracts or the Contract Disputes Act. The various -- and constantly changing -- U.S. Attorneys' offices will face a similar problem in trying to defend against claims they otherwise have no occasion to litigate.

Moreover, instead of an appeal on the record to the United States Court of Appeals for the Federal Circuit (41 U.S.C. § 607(g)(1)), a tribal contractor will be allowed to challenge an adverse determination by an agency board of contract appeals in the Claims Court or a United States district court. We are aware of no justification for this unprecedented departure from the "fair, balanced, and comprehensive statutory system of legal and administrative remedies" established by the Congress in the Contract Disputes Act to resolve contract-related claims against the government. See S. Rep. No. 1118, 95th Cong., 2d Sess. 1 (Aug. 15, 1978). Singling out tribal contractors in this way raises significant litigative problems. It also is likely to generate pressure from other classes of government contractors seeking the same opportunity.

The report accompanying the Committee amendment to S. 1703 provides no persuasive rationale for creating a specialized scheme of judicial review for disputes involving self-determination contracts. The report notes that:

> The amendments made by section 110 are necessary to give self-determination contractors viable remedies for compelling BIA and IHS compliance with the Self-Determination Act. The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. . . . Existing law affords such

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8 This logically follows from proposed section 110(a), and is made explicit in proposed section 110(d)(2) as contained in section 206 of the Committee amendment to S. 1703.

9 For example, members of agency boards of contract appeals must have a minimum of five years experience in public contract law. 41 U.S.C. § 607(b)(1) (1982).

contractors no effective remedy for redressing such violations.

S. Rep. No. 274, 100th Cong., 1st Sess. 37 (Dec. 22, 1987). We strenuously dispute the allegations contained in the above passage. But even if true, these assertions simply justify application of the Contract Disputes Act -- in toto -- to self-determination contracts. They provide no basis for applying that Act in part, but then establishing a completely new method of judicial review.

The report speaks at length about a perceived inability on the part of tribal contractors to obtain necessary redress under current law. Although we do not completely accept those contentions, they are irrelevant in determining whether the tribes should be provided judicial remedies other than those contained in the Contract Disputes Act. In the past, any problem in obtaining judicial review of a self-determination contract dispute principally could be attributed to the fact that the Contract Disputes Act did not apply to such contracts.[10] But S. 1703 changes that simple fact.

Now that the Contract Disputes Act is to apply to self-determination contracts, there is no persuasive reason for allowing the Indian tribes to deviate from the time-tested method of seeking judicial review specifically provided for in that Act. No doubt other government contractors also would prefer to litigate their contract claims in the district courts. But the United States Claims Court is highly specialized and experienced in resolving both contract disputes and Indian claims. It is a court of nationwide venue, access to which has been made convenient for litigants across the country. There is no plausible reason for granting tribal contractors the right to avoid that forum at their whim.

In addition to the lack of any reasonable basis for exempting tribal contractors from the provisions concerning judicial review contained in the Contract Disputes Act, the alternative provisions contained in proposed section 110(d)(2) would increase transaction costs, as well as raise significant questions of law. For example, tribal contractors would have an additional level of review available in challenging a contracting officer's decision. Under the Contract Disputes Act, a contractor has one chance at de novo review (before an agency board of contract appeals or in the United States Claims Court), one appeal as a matter of right from that review (to the Federal Circuit, regardless of the trial forum), and subsequent

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[10] Busby School of the Northern Cheyenne Tribe v. United States, 8 Cl. Ct. 596 (1985); Papago Indian Tribe of Arizona, IBCA-1962 and IBCA 1966, (1986), 22 I.D. 191, 86-2 BCA 18,859.

discretionary review in the United States Supreme Court (28 U.S.C. § 1254). Under proposed section 110(d)(2), an additional level of review is injected for no apparent reason.[11]

We vigorously contest any notion that an additional layer of review of self-determination contract claims is necessary or desirable. Not only will this delay the resolution of self-determination contract claims, but it is equally sure to increase the transaction costs associated with pursuing and defending such claims.

The judicial review provisions in proposed section 110(d)(2) also are likely to produce a great deal of uncertainty in the law. Under the Contract Disputes Act, the United States Court of Appeals for the Federal Circuit is principally responsible for and capable of developing a stable body of law applicable to resolving public contract disputes. That may well change for the worse if proposed section 110(d)(2) is enacted. Because that proposed section would allow self-determination contract claims to be litigated in the various district courts, those courts routinely would be asked to rule upon questions of public contract law.

The question then becomes whether those courts should consider themselves bound by Federal Circuit precedent. The Committee amendment does not answer that question. Nor is the answer obvious under existing law. Credible arguments can be made for appellate jurisdiction over district court decisions involving self-determination contracts in both the Federal Circuit and the regional circuits. Compare 28 U.S.C. §§ 1294 and 1295(a)(10).

The potential for confusion may well be exacerbated by section 204 of the Committee amendment, which would exempt self-determination contracts from the coverage of federal procurement law and federal acquisition regulations. To the extent there is a recognizable body of public contract law, it largely has evolved as the courts or agency boards of contract appeals have

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[11] Under proposed section 110(d)(2), a tribal contractor might first challenge an adverse contracting officers decision before an agency board of contract appeals. If the contractor is dissatisfied with the board's decision, that decision can then be challenged, as a matter of right, in either the Claims Court or a United States district court (for still another de novo review?). And, of course, the decision of either the Claims Court or the district court will also be appealable as a matter of right to a Circuit Court of Appeals, with discretionary review in the United States Supreme Court. This scenario could result in four separate decisions upon the merits of a self-determination contract claim before it is finally resolved.

interpreted and applied federal procurement law and the federal acquisition regulations.[12] Regardless that self-determination contracts may not otherwise be considered "procurement contracts," unless this body of existing law can be looked to for guidance, the courts and boards will have no foundation upon which to resolve disputes.

This legislation would create a most disturbing anomaly. Self-determination contracts would be subject to some -- but not all -- of the procedural aspects of the Contract Disputes Act. At the same time those contracts would not be subject to the substantive law interpreting and applying that Act. And many of the courts being asked to deal with this confusion will have had no prior experience with public contract law. In short, what heretofore has been a relatively stable body of law will become yet another legal quagmire. And, of course, when the law is unsettled, the incentive for litigation increases. No one benefits from such a result -- not the government, not government contractors, and certainly not the Indian tribes.

Applying the Contract Disputes Act to self-determination contracts raises many serious concerns.[13] The adequacy of the Act's framework for judicial review, however, is not one of them. As a result, S. 1703 should allow tribal contractors the very same opportunity for, and standard of, judicial review that is available to every other government contractor, but no more.

For strong public policy reasons, we also must continue to object to proposed section 110(e), which makes both the Contract Disputes Act and the Equal Access to Justice Act (EAJA) applicable retroactively to tribal contractors whose self-determination contract disputes were resolved between March 17, 1986, and the enactment of S. 1703. Retroactive application of

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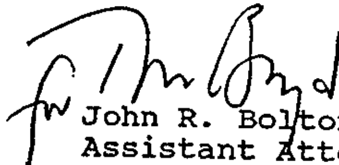
[12] The Contract Disputes Act, by its terms and from the legislative history, was carefully crafted to apply principally to "procurement contracts." <u>See</u> 41 U.S.C. 602(a) (1982) (With the exception of contracts for the sale of personal property, the Contract Disputes Act applies solely to contracts to procure goods or services.). As a result, the substantive law involving the Contract Disputes Act essentially is procurement contract law.

[13] For example, because funding for self-determination contracts is appropriated and managed in markedly different fashion from other agency appropriations, with the agency having much less flexibility to shift self-determination funds, applying the Contract Disputes Act -- and its provisions concerning access to and reimbursement of the Judgment Fund for successful claims -- to self-determination contracts may well lead to a significant loss of agency and Congressional control over appropriations for the self-determination program.

laws like the EAJA to controversies which already have been resolved often generates more inequity -- not to mention problems and expense -- than it rectifies.[14]

For the reasons stated above, and those contained in my letter of October 27, 1987, we remain opposed to S. 1703, as amended. The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,



John R. Bolton
Assistant Attorney General

cc: Honorable Daniel K. Evans
Honorable Joseph R. Biden
Honorable Strom Thurmond

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14 The Committee report suggests that this retroactivity is premised upon the same rationale which supported the retroactive application of the 1985 amendments to the EAJA. S. Rep. No. 274, at 37. But this rationale is incorrect. At the time the 1985 amendments to the EAJA were enacted, the EAJA had lapsed because earlier reauthorization legislation had been vetoed. The President's veto did not reflect any lack of support for the EAJA, but only his dissatisfaction with certain provisions of what was to be a permanent reauthorization. It was clear to all concerned that the EAJA ultimately would be reauthorized, and that it would be extended to cover those cases otherwise not covered because of the intervening lapse. As a result, all parties to those cases were, or should have been, aware that an application for fees and expenses under the EAJA ultimately might be appropriate. Unlike the disputes which likely would be revived by proposed section 110(e), in those cases there was ample incentive and notice to preserve the evidence and arguments which would likely bear upon the merits of any such application.