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Construction on Tribal Lands

Part Three:

**Practical Applications to Construction
Contracting in Indian Country**

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acts with Indian Tribes

or on Tribal Lands

Part Three: Practical Applications to Construction Contracting in Indian Country

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I. Doing Business with Indian Tribal Entities

A. Increased Commerce with Indians:

In Parts One and Two we have the definitions and distinctions needed to start analyzing the situations presented by clients in the construction industry that want advice on doing business with Indian tribes or related entities. There was a time when construction on tribal lands was less likely to be under contract with the Indian tribe itself. Large projects generally were with the BIA, HUD or some federal agency. As such the projects were procured under the federal procurement system and were governed by federal statutory law and the Federal Acquisition Regulations.

While there are still construction contracts with federal agencies on the Indian tribal lands, there has been an enormous growth in construction contracts directly with Indian tribes. Many times these contracts do not involve federal procurement policies and provisions, although these policies and provisions may be imported into the construction contracts as a result of the terms of a grant or self-determination contract.

Construction contracts directly with Indian tribes are significantly increasing. Unfortunately, an internet search was unable to turn up any general statistics on the growth and current volume of construction direct with Indian tribes. Why has doing business with Indian tribes increased? There are several reasons. First, there has been a growth in Indian tribal wealth and Indian individual wealth. Some of the wealth has come from the development of natural resources. Additionally, Indian gaming has produced wealth that the tribes have been putting

back into tribal development. A successful casino will begin with one construction contract and spawn several more for the expansion of the casino. A successful casino will soon have contracts for hotels and golf courses. Shopping centers and truck stops will develop in the area. At the same time gaming profits or profits from natural resources will lead to development of tribal visitor centers, administration buildings and other tribal buildings. These developments provide jobs on or near the reservation which in turn results in additional spending power on or near the reservation which in turn results in construction of places to spend the money without having to go off the reservation. At the same time there are still very poor tribes, particularly in low population areas or areas with few exploitable resources.

A second reason has been the change in federal government policy from having the federal government contract for the construction for the benefit of the Indian tribes to Indian self-determination with the Indian tribes acting in their own behalf with a federal advisory and funding role. This change is illustrated by The Indian Self-Determination and Education Assistance Act of 1975 (PL93-638) 25 U.S.C. §450 *et seq.*, as amended.ⁱⁱ

Sec. 450f. - Self-determination contracts

(a) Request by tribe; authorized programs

(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs –

Thus, contracts that would otherwise have been with the federal government can shift to tribal governments. For example, the Hoopa Valley Tribe, Hoopa Valley Indian Reservation, in its Construction Tax Ordinance notes that “by reason of a self-governance compact between the Hoopa Valley Tribe and the United States of America, [Hoopa Valley Tribe] has endeavored to construct health care facilities, residential housing, governmental offices, roads and similar infrastructure construction projects.”ⁱⁱⁱ

Construction that is undertaken by a tribe pursuant to an agreement with the Secretary of the Interior does not require all of the Federal Acquisition Rules or federal regulatory requirements that would be applicable if the federal government were contracting directly. However, some federal requirements are mandated. Even with poor tribes, self-determination contracts may increase construction directly with tribes. For example, wages shall comply with the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494) (40 U.S.C. 276a et seq.). 25 U.S.C. §458aaa-8. In addition, construction that is undertaken as a result of a federal grant will have grant conditions that reflect federal requirements. When you investigate the source of funding, you should discover these requirements if they have not been placed in the contract documents.

B. Indian Trader Laws:

Originally enacted in 1872, Section 81 of Title 25 governed contracts with Indians. The law originated to control predatory commercial practices.^{iv} Prior to the 2000 amendment, the law appeared to invalidate any agreement with any tribe of Indians calling for the payment or delivery of money, as well as other matters relative to Indian lands, unless the agreement was approved by the Secretary of the Interior and the Commissioner of Indian Affairs. Frankly, there were many contracts that appeared to fall squarely within the terms of the statute but which did not comply with the requirements. An effort to obtain approval to sell plumbing equipment on the Navajo reservation was met with a failure to even comprehend the request for approval and, once the request was understood, with disbelief.

Luckily, the 2000 amendment substantially changed the law. It now provides that “[n]o agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.”^v This change reflects that growing federal government approval of Indian self-determination.

C. *Analytical Framework*

Just as a construction lawyer might analyze a payment claim by looking at the contract privity chain and where the property was and who owned the property, the construction lawyer must perform an analysis of the parties, the property and the activity to determine answers to questions about contracting with Indian tribes. *See, also*, Addendum: Checklist.

1. The Parties to the Contract

- (a) Indian tribe or other tribal entity, corporation, or agency
- (b) Individual Indian (member or non-member Indian)
- (c) Non-Indian person or other entity
- (d) Federal or state government or agency

2. Place of Performance

- (a) Reservation
- (b) Indian country
- (c) Allotment
- (d) Private (Indian owned or non-Indian owned)

3. What governments may have jurisdiction?

- (a) Federal
- (b) Tribal
- (c) State
- (d) More than one

4. What is the impact on Indian interests or federal Indian interests from the activity?

5. What is the governing law from each of the jurisdictions?

D. *Taxation Issues*

It is exceedingly important for any company doing business with Indian tribes or on Indian land to understand what taxes may be assessed. A simple example will make the point. A construction company working on the Navajo Reservation on a road project contract with the Bureau of Indian Affairs recognized and knew that it was required to pay the 3% gross receipts tax imposed by the Navajo Nation. Accordingly, it took account of that in its pricing. Since it was working on the reservation and for the federal government, it did not think it relevant that it was also within the borders of the State of New Mexico. When it had a 6% New Mexico Gross Receipts tax imposed on the project revenues, it had not accounted for that in its pricing. Taxation can have an enormous effect upon a successful project. Great care must be taken in advising clients with respect to taxation issues. Both to the States and to the Tribes it is a matter of enormous self prestige.^{vi}

1. Indian Taxation: The power to tax is a feature of sovereignty. Indian tribes have the right to enact taxes. See, *Washington v Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980).

Two cases illustrate the boundaries of a tribe's power to tax. Compare *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (Tribe has power to tax non-Indian activities on Indian land) with *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (Tribe's inherent power to tax does not extend to non-Indian activities on non-Indian land within the reservation).

In comparing these cases both have the tribe as the taxing authority, both involve taxing non-members of the tribe, but the difference was *Merrion* arose on Indian land and *Atkinson*, while within the reservation boundaries, was not on Indian land. While not the entire analysis,

and there are exceptions not applicable to the *Atkinson* facts, these cases note the importance of the distinctions raised in earlier parts of the paper.

The analysis, however, is not that simple because one must take account of two exceptions that might apply even when the activity to be taxed is not on tribal land. In *Montana v. United States*, 450 U.S. 544 (1981), the Supreme Court noted two possible bases for tribal jurisdiction of non-members: (1) a tribe may regulate by taxation and licensing the activities of non-members who have consensual commercial dealings, contracts, leases or other arrangements with the tribe or its members; and (2) a tribe may regulate the conduct of non-members within the reservation when the activities have “some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Montana*, 450 U.S. at 566. See, also, *Atkinson*, 532 U.S. at 651.

From the standpoint of construction contracts with Indian tribes, the first exception becomes the rule. If the contractor has a contract with an Indian tribe for performance within the reservation, the tribe will have the power to tax or to license the activities. The type and character of the tax will vary enormously, e.g. 3% of gross receipts, 7% of sales of materials on reservation, tax on construction projects by subordinate tribal entities but not on projects directly by the tribe, etc.

Since most construction contracts contain boilerplate that requires the payment of all taxes and the compliance with all applicable laws, consideration should be given to negotiating taxes as additive to the price or for allowance of an increase in the price if taxes increase. “Contractual arrangements remain subject to subsequent legislation by the presiding sovereign.” *Merrion*, 455 U.S. at 147.

2. State Taxation: We turn now to state taxation of contracts with Indian tribes. It is possible for both the state and the tribe to have power to tax the same transactions. *Merrion, supra*, 450 U.S. at 151 (“different sovereigns can enjoy powers to tax the same transactions.”); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 at 158 (1980).

The power of the states to tax transactions with or by Indians is limited. First and foremost, the states may not tax tribal lands or tribal entities. *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866). Furthermore, the states may not tax the income of an Indian earned on the reservation. *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164 (1973).

State may not impose a state tax on gross income of a corporation doing retail trading business with Indians on the reservation. *Warren Trading Post Co. v. Arizona State Tax Comm*, 380 U.S. 685 (1965) The analysis was one of pre-emption. Allowance of state taxation in this circumstance would substantially frustrate federal legislation covering Indian traders and other factors. *Warren*, 380 U.S. at 691-692. At the same time a state could impose a tax on cigarettes sold to non-Indians on reservation land even though sold by Indians. *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980). The analysis was still a pre-emption analysis, but in *Colville* the Court failed to find a significant tribal interest in the sale of cigarettes to non-Indians. See, also, *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991).

With respect to non-Indians contracting for construction with Indian tribes, Canby notes: “States also have been largely unsuccessful in taxing non-Indian contractors doing business with tribes on reservations.” Canby Jr., William C., American Indian Law In A Nutshell, *supra* at 91. It is not a black and white rule, but a preemption analysis. In *White Mountain Apache Tribe v.*

Bracker, 448 U.S. 136 (1980), Arizona sought to impose motor carrier license and fuel taxes on non-Indian companies doing business with a Tribal entity, Fort Apache Timber Co. The Court held that Arizona's effort was pre-empted by federal law. *Id.* at 448 U.S. at 138. The Court looked largely to the tribe's strong financial interest in the lumber industry and the number of Indian employees with both the timber industry and the contractor. The Court quickly reviewed many of its cases on tribal sovereign vis-à-vis the states and noted that pre-emption with respect to Indian tribes is not a matter of express legislation. It states:

More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law. Compare *Warren Trading Post Co. v. Arizona Tax Comm'n*, *supra*, and *Williams v. Lee*, *supra*, with *Moe v. Salish & Kootenai Tribes*, *supra*, and *Thomas v. Gay*, 169 U.S. 264 (1898). Cf. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S., at 171, 93 S.Ct., at 1261; *Mescalero Apache Tribe v. Jones*, 411 U.S., at 148, 93 S.Ct., at 1270.

White Mountain Apache, *supra*, 448 U.S. at 144-145. The Court then explored the broad federal authority relating to timber on tribal lands and its history, the existence of pervasive regulations on timber by the BIA and its approval of contracts, etc. It noted that Arizona could not demonstrate services that it provided in return for the taxes, nor a regulatory purpose other than the need to raise revenue.

In *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982), New Mexico charged gross receipts tax on the receipts of a non-Indian contractor with a cost plus contract for construction of a school for the Ramah Navajo School Board, a Navajo Tribal entity. The trial court had entered judgment for the State

of New Mexico since the legal incidence of the tax fell on the non-Indian contractor, essentially the result you would reach if it were a BIA contract. The Supreme Court applied the pre-emption analysis of *White Mountain Apache* and held that the tax was pre-empted, noting federal regulation of construction and financing of education institutions as well as education quality along with minimal state interests. *Id.* 458 U.S. at 839-843.

In *Ramah* the Supreme Court was asked to create a bright line and hold that “on-reservation activities involving a resident tribe are presumptively beyond the reach of state law even in the absence of comprehensive federal regulation...” *Id.* 458 U.S. at 845. The Court declined to do so. Federal pre-emption is not a bright line and results in a level of uncertainty. Since pre-emption analysis has in the past relied to a great deal on issues of federal regulation of an area and, with self determination spreading, federal regulation will decrease (or at least the tribes hope that it will decrease), the analysis should move more and more to the conflict between state and Indian sovereignty. However, when the analysis was one of pre-emption, the case cannot be relied upon to support the same result when the various interests and regulatory systems have changed.

E. Taxation of Contractors on Tribal Lands Under Contracts with the United States or its Agencies.

Prior to the vast increase in construction performed directly for Indian tribes and tribal organizations, the majority of work performed on reservations was performed under contract with an agency of the United States, frequently with the BIA. Several Supreme Court cases established the law for these cases. In *United States v. New Mexico*, 455 U.S. 720 (1982), the Supreme Court considered New Mexico’s imposition of gross receipts tax on revenue of contracts with the federal government. It held that tax immunity was appropriate only when the tax levy falls upon the United States itself or its agencies. *Id.* 455 U.S. at 735. It was not

sufficient that the federal government was ultimately liable by contract to pay the amount of the tax. *Id.* 455 U.S. at 742-743.

In *Arizona Department of Revenue v. Blaze Construction Co., Inc.* 526 U.S. 32 (1999), the Arizona Department of Revenue had imposed a tax on Blaze^{vii} on its proceeds from a road construction contract with the Bureau of Indian Affairs within the Navajo Reservation. Since the contract was with the federal government and not the tribe, *New Mexico, supra*, should mean that the tax levied on the contractor was acceptable. The issue was whether performing the contract on the reservation made a difference. It did not. *Blaze, supra*, 526 U.S. at 34. The Arizona Court of Appeals had applied the analysis and cases discussing a state's right to tax contracts with Indian tribes. The Supreme Court refused to do that when the contract was with the Federal Government. It maintained the clear line of *New Mexico, supra*, based upon the party that bears the incidence of the tax and refused to impose a balancing test. *Blaze, supra*, 526 U.S. at 37. The Court noted that the result might well be different if the tribe had entered into an agreement under the Indian Self-Determination and Education Assistance Act, *supra*.

F. Some Tax Related Construction Problems:

Tax issues may lead to contract differences. For example, large equipment may be manufactured and supplied to a contractor off-reservation, thereby resulting in state taxes that might not otherwise end up in the construction price. If materials are shipped direct to the non-Indian contractor at a location on the reservation, the state tax issue would be one of pre-emption. If the tribe buys the materials, the tax issue should be avoided. Thus, contracts may require separate purchasing and delivery of large or expensive equipment. The Pueblo of Laguna appoints the prime contractor as its agent for purchase of major equipment and supplies in excess of \$500.00 and has the contractor issue Pueblo of Laguna purchase orders. This adds

to the administrative and payment coordinating duties of the contractor. The requirement is set out in an addendum to Laguna contracts.

We should note that there can be problems with the interface of the various tax systems. In New Mexico, for example, a prime contractor can issue a certificate for a non-taxable transaction to its subcontractors and suppliers, provided the prime contractor pays the applicable New Mexico Gross Receipts Tax. This avoids doubling up on the tax for the many-layered construction process. However, if the prime contractor is not subject to the New Mexico tax, it cannot use the certificates. Subcontractors and suppliers assume that the certificate they have on file will work. This can create substantial tax liability. For example, a steel fabricator that is offsite may normally rely on a certificate to avoid the tax, but it cannot do so if the prime contractor is not paying the tax. Since subcontract documents normally make each party responsible for their taxes, the subcontractor or supplier may have no upstream recourse.

G. Regulation of Construction Activities

Just as the Indian Tribes have power to tax construction companies performing work on the tribal land, the Indian tribe sovereignty allows the tribe the power to regulate the business activity, always subject to overriding federal regulation.

1. Business Permits, Building Codes and Building Permits

Just as any construction company should check each state and municipality in which it wishes to do business, it should check to see if a business permit is required to work on the reservation. Hoopa Valley Tribe, Hoopa Valley Indian Reservation, Ordinance No: 9-98, Title 56.201 provides: “This Title shall be applicable to all persons engaged in business within the exterior boundaries of the Reservation. No person shall engage in business upon the Reservation without a valid business license issued by the Tribe, except as provided in Section 204(1).” The

licenses are classified by duration and range from \$10.00 to \$50.00 for an activity of more than three months. The licensee consents to jurisdiction of Tribal court and service of process.^{viii}

At the same time each jurisdiction must be checked for requirements for building permits and code compliance and inspection. Tribal governments may require building permits; for example the San Ildefonso Pueblo Code Ch 54 requires a building permit for construction in excess of \$100. There is no mention of building codes.^{ix} Tribal governments have the power to enact building codes for construction within tribal land. For example, Hoopa Valley Tribe, Hoopa Valley Indian Reservation, Ordinance No: 1-75 adopts “1997 Uniform Building Code, including all uniform fire, plumbing, electrical, mechanical, and related codes, and as thereafter amended.” The Eastern Band of Cherokee for the Cherokee Reservation has an extensive provision adopting the North Carolina State Building Code, National Electric Code, inspectors, plan review and building permits.^x The code also requires locally quarried stone – an example of one of the surprises that you might not take into account if you do not do the research.

II. **Construction Contracts with Indian Tribes**

A. Procurement Methods:

An Indian Tribe is a sovereign entity that governs its own affairs subject to federal law. Absent additional facts, the tribe could use any method of procurement that it wishes. Given the very great number of recognized tribes and the disparity of size, you might expect a great variety of methods. Some tribes have procurement codes and some do not. The larger the tribe or the wealthier the tribe, the more likely it is to have a procurement code of its own.

When the funds come from a specific source, that source may well dictate the procurement terms. However, as a general matter the federal procurement laws and regulations do not apply to contracts directly with Indian Tribes. However, section 450j of Indian Self-

Determination Act giveth with one hand and taketh away with the other, requiring that each construction contract funded via the Self-Determination Act be reviewed for the federal law that has been inserted.

(a) Applicability of Federal contracting laws and regulations; waiver of requirements

(1) Notwithstanding any other provision of law, subject to paragraph (3), the contracts and cooperative agreements entered into with tribal organizations pursuant to section 450f of this title shall not be subject to Federal contracting or cooperative agreement laws (including any regulations), except to the extent that such laws expressly apply to Indian tribes.

(2) Program standards applicable to a nonconstruction self-determination contract shall be set forth in the contract proposal and the final contract of the tribe or tribal organization.

(3) (A) With respect to a construction contract (or a subcontract of such a construction contract), the provisions of the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) and the regulations relating to acquisitions promulgated under such Act shall apply only to the extent that the application of such provision to the construction contract (or subcontract) is—

(i) necessary to ensure that the contract may be carried out in a satisfactory manner;

(ii) directly related to the construction activity; and

(iii) not inconsistent with this subchapter.

25 USC §405j. [emphasis added.]

The regulations of BIA and IHS establishing standards for self-determination contracts, 25 CFR Part 900, allows the tribe to adopt its own standards as long as the standards meet some minimum requirements which are basically money management principles. If the tribe does not adopt its own standards, then 25 CFR §900.48 provides basic standards: (a) Tribe must ensure performance of its contracts; (b) maintain written standards of conduct governing performance of employees who award and administer contracts, including (1) avoid conflict of interest, real or apparent, (2) avoid gratuities, bribes, favors, etc., and (3) standards must have penalties; (c) avoid unnecessary or duplicative items and ensure a reasonable price; (d) provide full and open competition, to the extent necessary to assure efficient expenditure, with Indian preference and

tribal preference; (e) award only to responsible contractors; (f) maintain records of all significant transactions; (g) be solely responsible for resolving disputes, protests, etc.

Grant money from the BIA comes with procurement requirements. 25 CFR §276.12 Part (a) states that the grantee is the responsible authority without recourse to the BIA. It then provides a list very similar to that noted above for 25 CFR §900.48, including a requirement of maximum open and free competition, whether negotiated or advertised. IFBs or RFPs must be clear, must avoid unduly restrictive competition, must require small business and minority owned businesses, etc. The regulation prefers formal advertising to negotiation but allows the latter under some conditions. The rules proceed to impose a variety of the socio-economic requirements of federal law for equal employment opportunity, Davis-Bacon Act, Anti-Kickback Act, Contract Work Hours and Safety Standards Act. By the time we are done, these contracts begin to closely resemble federal contracts. Frankly, one begins to see why many Indians believe that the BIA and Self-Determination are somewhat inconsistent.

After determining the extent to which procurement is dictated by federal law or regulations, self determination contracts or grant requirements, the contractor should determine to what extent the Tribe has its own Procurement Code. The Pueblo of Laguna has a Procurement Code that establishes its preference system, discussed below, as well as a requirement to use competitive sealed bids in all cases other than professional services, emergency procurement and small purchases. Its provisions are similar to competitive sealed bid provisions of the ABA Model Procurement Code. Bid security is required. It is not a lengthy document and lacks many provisions that would be found in the procurement codes of states or cities. However, in the 2000 Census, the Pueblo had a population of 3815 and occupied 777

square miles. The Procurement Code probably compares favorably to other entities of less than 4000 citizens.

Attached to this paper are two samples, one an Invitation to Bid for construction of Senior Citizen Complex and another a Request for Proposals for design and planning of a Multi-Purpose Building, both from the Navajo Nation. These were issued pursuant to the Navajo Procurement Code. The reader will note that they are very familiar in format. Obviously, any company interested in these projects will have to buy the contract documents and, in the Navajo Nation capital of Window Rock, Arizona, would be well-served to obtain copies of the pertinent provisions of Navajo Code.

B. Indian Preference

Most tribes and federal agencies working with or funding tribes seek to use the contract process to assist the tribal members or Indians to gain economic experience and expertise.^{xi}

With respect to Indian Self-Determination, 25 USC 450e, the legislation provides the basis:

(b) Preference requirements for wages and grants

Any contract, subcontract, grant, or subgrant pursuant to this subchapter, the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C. 452 et seq.], or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible—

(1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and

(2) preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 1452 of this title.

(c) Self-determination contracts

Notwithstanding subsections (a) and (b) of this section, with respect to any self-determination contract, or portion of a self-determination contract, that is intended to benefit one tribe, the tribal employment or contract preference laws adopted by such tribe shall govern with respect to the administration of the contract or portion of the contract.

The BIA grant regulations 25 CFR §276.13 provide:

Any grant or subgrant shall require that to the greatest extent feasible:

(a) Preferences and opportunities for training and employment in connection with the administration of such a grant or subgrant shall be given to Indians.

(b) Preference in the award of a subgrant, contract or subcontract in connection with administration of a grant shall be given to Indian organizations and economic enterprises.

(c) A tribal governing body may develop its own Indian preference requirements to the extent that such requirements are not inconsistent with the purpose and intent of paragraphs (a) and (b) of this section for grants executed under this part.

Such provisions allow preference in procurement and in employment. Unlike the BIA grant rules which allow a tribal preference to take precedence over a general Indian preference, the rules frequently do not specify that the preference is to be given tribal members or tribal entities. As a result a conflict can arise between the general Indian preference and preference established by a particular tribe. Thus, in one case involving employment preference, a construction contractor had its records subpoenaed by the Office of Navajo Labor Relations in an attempt to prove non-compliance with the Navajo preference, while the Indian Health Service (IHS) by contract was requiring a general Indian employment requirement. Ultimately the jurisdiction of IHS was established and that overrode the Navajo Labor preference.

The rules, ordinance or law of any particular tribe with respect to preferences can be quite elaborate. The Pueblo of Laguna Procurement Code (May 1987) has five levels of preference: (1) businesses owned by members; (2) businesses owned by non-membered Lagunas; (3) businesses owned by Indian in-laws of Lagunas; (4) businesses owned by non-Indian in-laws of Lagunas; (5) businesses owned by other federally recognized Indian tribes and their members.

C. Construction Contracts Forms and Terms

It has been the experience of the authors that the construction contractor can expect contract forms in the same variety confronted in dealing with other governmental owners. The use of forms from the American Institute of Architects and the Engineers Joint Contract

Documents Committee is common but always with Supplemental General Conditions or Special Provisions. After all, it is the architects and the engineers that put the majority of contract documents together on Indian projects, just as elsewhere. With the increased use of Design Build and Construction Management, generally both are being used extensively by Indian tribes to obtain the construction product without needing to have extensive experience within the tribe. For example for a major casino, the construction documents used were the AIA A111 (1997) with a modified AIA A201 (1997) plus Supplemental General Conditions. The modifications were for multiple primes, milestone system for completion, remove arbitration and some other fine tuning. On a design build project for a large school complex (2.5 million in the design/engineering/planning) the contract was a DBIA Document No. 530 *Standard Form of Agreement Between Owner and Design-Builder for Cost Plus Fee With Guaranteed Maximum Price* and the general conditions were DBIA Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder* (1998 Edition). These documents were extensively negotiated. On a project for a Pueblo Housing Authority, the Architect agreement was an AIA B141 (1997) that had been heavily modified. While the arbitration clause remained, it was enforceable only in tribal court while at the same time it seemed every other sentence said that sovereign immunity was not waived.

Just as in all construction contracting, if you are not being asked to propose the contract form, you must determine what form is being used and how it has been modified. You may be able to negotiate changes and if so, you should inquire about that process. Most of the terms will be common to construction throughout the United States, but there are some items that are particularly interesting in contracts with Indian tribes. Already we have noted the likelihood that there will be a preference system for employment as well as contracting. The contractor needs to

know its work force, skill level and reliability. In that regard, the contractor should familiarize itself with the religious holidays and feast days.

1. *Available Funds:* With or without a waiver of sovereign immunity, the source and amount of available funds must be determined. The bold contractual statement that the Indian tribe will pay the contract sum is a moral imperative, but not a legally enforceable one. Luckily, Indian tribes usually have the funds anticipated for the project and, if the project comes in high, the tribe will negotiate reductions in scope or will not proceed. Available funds may not contain adequate (or any) contingency for changes. There is some recognition in the tribes that I have dealt with that assurance of payment helps reduce the price. There are some steps that can be considered:

- (a) Letter from the financing source stating the availability of funds;
- (b) Letter of Credit guaranteeing payment when approved application submitted;
- (c) Place funds in escrow with escrow instructions based upon approved application.

The position of subcontractors and suppliers is improved when a payment bond has been required from the prime contractor. These are common law bonds and not Miller Act bonds when the obligee is an Indian tribe. It is entirely possible that the bond may be required by federal regulations relating to the funding, e.g. 24 CFR §905.170 (HUD funded). In turn these bonds may be enforceable in federal court under 25 USC §1352.^{xiii} Since there are no mechanic's liens on tribal lands, all subcontractors and suppliers should require copies of the prime contractor's payment bond prior to commencing work or supplying materials on reservation projects.

2. *Changes and Notice Provisions:* Since waivers of sovereign immunity cannot be implied, the changes clause becomes more important. If the contractor has been wise, it will know the source and amount of the funds. It is vital to insist on the change order process and to

determine that the funds for the change order are available. You do not want to rely on implied waivers, promissory estoppel and all of the judicial methods to avoid contractual results of non-compliance with change order and notice provisions. A court is unlikely to rescue you, since you are not going to be in court and the tribe may insist on strict conformance even if funds are available.

3. *The Written Record:* In my experience, it has been difficult to get decisions or even discussions memorialized in writing. Some tribes I have dealt with in the western area seem to prefer oral to written and general to specific communication. Meetings can be very long trying to reach consensus. There is difficulty with making a decision unless there is a consensus. Minutes of meetings are unlikely if the contractor or architect/engineer does not prepare them. The architect/engineer may not be required to do minutes and may not take the time to do them if it cannot charge for the time. Write the minutes yourself, list the decisions and comments made and then send them out for comment. Use confirming letters or memos for all verbal directions, comments or notices that would otherwise be oral. The fact that there will be no litigation is no justification for failure to communicate in writing.

4. *Communication Chain:* The contractor needs to know the communication chain and who makes decisions on what. The owner's named representative should be in writing in the contract. If not, get it set out clearly at the start. In the disputed cases in this author's experience, a common cause of confusion, increased costs and disputes has been the interference by some influential tribal person in the process. If this begins on a project, every effort should be made to stop it before it becomes pervasive. Call a meeting of all the persons that should be involved in an effort to avoid the interference. If it continues, insist upon a written change to the contract to insert the role and authority of the person interfering.

D. *Disputes Resolution and Tribal Justice Systems:*

1. Disputes clauses: The construction contract clause on which the most attention is devoted is the disputes clause. Much of the materials relating to these clauses have been discussed in Parts One, Two and the earlier sections of this Part. First let me recap:

a. The tribe or tribal organization has sovereign immunity, even for written contracts. Part Two, I, A, *supra*.

(1) Even with a waiver of sovereign immunity, a decision in your favor may be exceedingly hard to collect except with voluntary compliance. Part Two, I, F, *supra*.

b. Regardless of immunity or a waiver of immunity from contractor claims, the tribe has jurisdiction over consensual contracts with them. Part Two, I, E, 3, *supra*.

c. Other courts that might have jurisdiction probably will require exhaustion of tribal remedies before exercising their jurisdiction.

d. Other courts will probably give full faith and credit or comity to tribal justice decisions.

e. You may need to present a request for changes not to a court, but to an executive or legislative person or group. Even when you cannot sue, the tribe may grant relief if you are entitled to it and respect and use the system available.

While all of these assertions may have exceptions, it is useful to deal with the most likely scenario.

Given the scenario, what does a contractor seek in a disputes clause?

a. An unequivocal waiver of sovereign immunity for actions brought on the contract. In general this is difficult to obtain from a tribe. However, if it is possible, Part Two has discussed at length what will be needed to have an enforceable waiver.

b. You are more likely to obtain a waiver if the waiver is very limited to changes under the change clause, but not other matters.

c. Frankly, many contractors feel more comfortable with an arbitration system with which they are more familiar than tribal court. Part Two, I, C and footnote 23, *supra*.

(1) The arbitration agreement should contain.^{xiii}

(a) an agreement to arbitrate all disputes,

(b) an agreement to be bound by any arbitration award, and

(c) an agreement that any award could be enforced in any state or federal court with jurisdiction.

d. Absent an arbitration clause, it may be easier to obtain a limited waiver of sovereign immunity if it is only for proceeding in tribal court. If so, it is enormously important (and difficult) to find out all you can of the tribal court.

e. In the absence of a waiver, it is still important to get a disputes resolution clause that takes the dispute as far as possible by clear contractual communications and to know the hierarchy of decisions within the tribe. Even when you cannot go to court, you can take the issue to the legislative or executive authorities.

2. Tribal Justice Systems^{xiv}: Part Two has a discussion of tribal courts and it should be read as the starting point for these comments. Often, if a tribe is willing to waive sovereign immunity, it will do so only in a tribal forum. Even if there has been no waiver and

the contractor cannot sue, the contractor may be liable to suit in tribal court. For example, the contractor is not being paid, terminates the contract and leaves the project. The tribe, which disagreed that payment was due, brings an action against the contractor in tribal court. If the contractor does nothing, a tribal judgment may issue that will be granted full faith and credit or at least comity in state or federal court.^{xv} The contractor should appear and defend and prove entitlement for the payment as a basis for its termination. Otherwise the tribal court judgment will be *res judicata* in any subsequent court. Thus, even if there is no waiver, the contractor needs to know the tribal justice system.

As with all tribal law, the law relating to the establishment, jurisdiction and procedures can be difficult to obtain. Sometimes, but not always, the justice system is established by constitution. There are some internet sites that have tribal constitutions and tribal justice codes of which National Indian Law Library, <http://www.narf.org/nill/tribaldocs.html>, Tribal Court Clearinghouse, <http://www.tribal-institute.org/lists/codes.htm> and National Tribal Justice Center, <http://www.tribalresourcecenter.org/tribalcourts/codes/default.asp> are three good starting places. Frequently, you have to obtain the documents from the Tribe itself or from its attorneys. Sometimes the justice system is created by an tribal law and is not constitutionally established. Sometimes there is no justice system that resembles a court. Keep in mind that some Indian tribes can have very small populations and an established court might be unnecessary. The tribe may also have a strong council or other traditional system.

The United States Supreme Court decisions dealing with tribal courts have shown a high degree of respect, deference and comity to tribal justice systems. *National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) [Tribal court should first decide its jurisdiction and that process should be exhausted before a federal court interferes.]; *Iowa Mutual*

Insurance Co. v. LaPlante, 480 U.S. 9 (1987) [Federal court should stay pending exhaustion of tribal court remedies and claim of incompetence is not a justification to fail to do so.] As noted earlier, if a legal forum is needed to decide a dispute arising out of a contract between an Indian tribe or tribal entity and a non-Indian construction company, it is most likely to be decided within the tribal justice system. The variety is great and before committing to the contract, a company should become familiar with the system in place where it intends to work.

III. **Concluding Remarks**

There are more than five hundred Indian tribes recognized by the federal government. These tribes vary from a few hundred persons to more than 600,000. The wealth of the tribes varies enormously. However, due to increased wealth and pride and the federal policy of self-determination, construction performed under direct contract with the tribes and tribal entities has been steadily increasing. This phenomenal growth is occurring throughout the fifty states.

Each tribe is a unique sovereign nation. Any attorney counseling a client who is performing construction under contract with an Indian tribe must know the law governing such contracts. These contracts are not federal contracts. Jurisdiction to regulate, tax, resolve disputes will be in the Indian tribe, even if it is also shared with a state or the federal government. Federal Indian Law is a specialty and the involvement of a lawyer that works in the area can be invaluable. Tribal Law has more than 500 variations and any attorney who needs to deal with tribal law needs to find assistance from another knowledgeable professional. Construction attorneys wisely refrain from handling construction liens in jurisdictions in which they are not licensed and yet may foolishly seek to handle a matter involving tribal law that they do not know and which is difficult to discover.

Hopefully the three papers in this series have provided construction lawyers with an outline of Federal Indian Law, the key distinctions and challenges, and sufficient examples of tribal law to demonstrate the enormous variety among these sovereign nations and the projects they are building. We hope you will be intrigued as well as informed about this challenging, growing area of law.

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Feedback

ROUGH ROCK SENIOR CITIZEN COMPLEX

INVITATION TO BID

The Rough Rock Chapter/Design and Engineering Services (Herein called the "Owner") invites all interested Licensed General Builders Contractors including those currently certified under the Navajo Nation Business Preference Law to Bid on specified Construction described in general as follows:

The Project: The project is identified as the **New Rough Rock Chapter Senior Citizen Complex**. The project is located approximately 30 miles West of Many Farms, Arizona within the Navajo Nation Chapter Compound, Apache County, Arizona.

The Scope of Work: The Work Consist of General Construction of a 4,206 sq. ft. The Work includes Provide Pre-Engineered Post Tension Foundation. Frame construction wall system for interior with drywall painted and exterior Split face block. New plumbing, heating, ventilation, air conditioning, electrical system, install new kitchen equipment. On Site improvements shall include handicap accessible ramps, and drainage. Site utilities (Electrical, Gas, Sewer and Water) shall be extended and connected to the building and shall be coordinated with N.T.U.A. and I.H.S. as required. The Work shall be provided in accordance to all latest building codes and requirements, the project shall be completed and in operation, all workmanship shall be provided with a one- (1) year warranty after project acceptance.

CONTRACT DOCUMENTS: Contract documents will be available on March 17, 2003 at the Office of Design and Engineering Services (DES), Second Floor (Administration Building NO. 1), Window Rock, Arizona. Interested proposers may obtain a Project Packet for a Non-refunded deposit of \$50.00. Inquiries should be directed to the attention of **Fredrick Marianito**, Director, Design and Engineering Services, The Navajo Nation, Post Office Box, 610, Window Rock, Arizona, telephone number (928) 871-6099 or (928) 871-6734.

The project will be awarded on A Contractual Agreement to the Proposer who submits the best proposal-in terms of:

1. **General Contractor License.**
2. **Time of Construction.**
3. **Navajo Preference.**
4. **Ability to Provide 100% Performance Labor and Material Bond of the contract sum.**
5. **General Liability and Builder Risk Insurance.**
6. **Subcontracting Listing.**
7. **Warranty - 1 year minimum (Workmanship).**

8. Bids must be received from more than two prospective contractors in order for the project to be awarded.

BIDS: The "Owner" will receive sealed bid proposals for **Rough Rock Chapter Senior Citizen Complex at Design and Engineering Services (DES), The Navajo Nation, Post Office Box 610, Window Rock, Arizona 86515, at 3:00 p.m. (MST) on April 9th, 2003** at which time the bids received will be opened publicly and read aloud. Any bids received after the date and time specified will not be accepted. FAX bids will not be accepted. No bids shall be withdrawn for a period of forty-five (45) days subsequent to the opening of bids without the consent of the Owner.

BID GUARANTEE: A bid guarantee in the amount of five percent (5%) of the proposed base bid must accompany each proposal in the form of a Cashier's Check, Certified Check or Standard Bid Bond (Personal checks will not be accepted.)

PREFERENCE & WAGES: The successful bidder shall comply with all applicable laws, rules and regulations of the Navajo Preference Business Law (NNBPL) 5 NTC Section 201 et seq, and Navajo Preference in Employment Act, 15 N.T.C., Section 601 et seq.

The Owner reserves the right to reject any and all bids and to waive any informality in the bids or in the best interest of the Navajo Nation.

By: Frederick Marianito, Department Manager III, Design and Engineering Services, Division of Community Development and any questions contact: [Marietta Lee](#), Programs and Projects Specialist, Navajo AML Public Facility Projects, NN DNR: Ph. 928.871.6982

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Feedback

Request for Qualification Statements For Planning, Architectural Design Services For Rock Springs Chapter - Multi-Purpose Building

Due Date: March 27, 2003

QUALIFICATION STATEMENTS from professional architectural engineering firms or persons to provide professional service for the above project will be received until **3:00 PM at the Capital Improvements Office, Tribal Administration Building No. Two (2), Second Floor**, Window Rock, Arizona 86515.

Project Description: Design, planning, first phase services for a variety of specialty task including legal survey for land withdrawal, utility analysis, community survey & needs assessment, public meetings, development of preliminary designs and a conceptual design for floor plan and space functions, building materials and elevation studies and final detailed probable cost estimates. A total of three-sties will be reviewed and included as part of site selection process. For additional information please contact [Casey Begay, Department Director II, 928-871-6509](#) or [Rock Springs Chapter Service Coordinator, 505-371-5407](#).

Format: Respondents shall provide five (5) copies of their Qualification Statements. Interviews may be held from a "short list" of respondents determined by the Selection and Review Committee and will be required to make a presentation addressing project related items selected by the committee. The Qualification Statement will be evaluated by the following category:

- General Information ----- 05 points
- Project Team Members ----- 15 points
- Respondent Experience ----- 05 points
- Technical Approach ----- 20 points
- Cost Control/Fee Schedule ----- 40 points
- Quality and Content of Proposal ----- 10 points
- Navajo Preference Certification ----- 05 points

Navajo Preference Certification: Selection of qualified professional firms and/or persons will be pursuant to the Navajo Nation Procurement Code, as amended, under Title II. Basic services compensation for the firm selected will be negotiated under the Procurement Code. In addition, the selected qualified firms will be required to provide a Certificate of Liability Insurance of Contract Endorsement amount and Professional Error & Omissions Insurance in accordance to the Navajo Nation's Risk Management Department requirement.

Preference and Wage: The selected qualified firm shall comply with all applicable laws, rules, and

regulations of the Navajo Preference Business Law (NNBPL), 5 NNC, Section 201 regulations of the Navajo Preference in Employment Act. 15 NTC, Section 601 et. seq.

The Owner reserves the right to reject any and all proposals and to waive any informality in the request for qualification statements or in the best interest of the Navajo Nation.

Will Be Advertise:

Navajo Times March 6 & 13, 2003

Gallup Independent March 4 & 10, 2003

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ⁱ I would like to express my appreciation to Vanya Hogen of Faegre & Benson, LLP and Ed Rubacha of Jennings, Haug & Cunningham, LLP for their review, comments and suggestions.

² “Since Title III (Self-Governance) was added to PL93-638 in 1988, a total of 206 tribes have now chosen to select services formerly run by the BIA to operate under their own powers.” Galen Louis, “The Self Determination Act” <http://members.tripod.com/~nezperce/self.htm> (11/1/97)

ⁱⁱⁱ Title 39 Ordinance 4-95
<http://doc.narf.org/nill/Codes/hoopacode/hoopat39construct.htm>

⁴ When Congress drafted what is now 25 U.S.C. § 81, it was concerned with the vulnerability of Indian tribes to unscrupulous lawyers and claims agents who were "plundering" the tribes "under the plea of services rendered." Cong. Globe 1486 (1871).

U.S. ex rel. Gulbranson v. D & J Enterprises, 1993 WL 767689, *6 (W.D.Wis.) (W.D.Wis.,1993) (unreported decision) "According to the Supreme Court, the statute was "intended to protect the Indians from improvident and unconscionable contracts." *In re Sanborn*, 148 U.S. 222, 227, 13 S.Ct. 577, 579, 37 L.Ed. 429 (1893); *see also Cong.Globe* 1483 (1871) (law is for Indians' "protection and to prevent them from being plundered"). At the time of the law's enactment, Indians apparently were being swindled by dishonest lawyers and claims agents. *See United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan Am. Management Co.*, 616 F.Supp 1200, 1217 (D.Minn. 1985), appeal dismissed, 789 F.2d 632 (8th Cir. 1986).”

Altheimer & Gray v. Sioux Mfg. Corp. 983 F.2d 803, *805 (C.A.7 (Ill.),1993).

⁵ 25 U.S.C. §81(b).

⁶ While not a significant factor for construction contracting, we note that the federal power to tax is fully effective in Indian country. Canby Jr., William C. *American Indian Law In A Nutshell*, Thompson West (2004), 261.

^{vii} Blaze was a Blackfeet Indian corporation owned by a member of the Blackfeet tribe, but Blaze conceded this made no difference. *Blaze*, 526 U.S. at 34.

^{viii} <http://doc.narf.org/nill/Codes/hoopacode/hoopat56blsc.htm>

^{ix} <http://doc.narf.org/nill/Codes/sicocode/sanildcodetoc.html>

^x <http://doc.narf.org/nill/Codes/ebcicocode/eccodech143building.htm>

^{xi} See discussion and notes in Part One II.E. with respect to preferential treatment as a political and not a racial classification. *Morton v. Mancari*, 417 U.S. 535 (1974).

^{xii} *Del Hur, Inc. v. National Union Fire Ins. Co.*, 94 F.3d 548 (9th Cir. 1996).

^{xiii} Perhaps it goes without saying that the method and rules of arbitration should be spelled out. At least one tribe has its own arbitration law. The Cherokee Code: Published by Order of the Tribal Council of the Eastern Band of Cherokee Indians, Chap 94, <http://doc.narf.org/nill/Codes/ebcicocode/eccodetoc.htm>

^{xiv} I use the term tribal justice system here to make the point that the system may not look like the usual state or federal court system.

xv See, e.g., Ariz. Rev. Stat. § 12- 136; N.C. Gen. Stat. § 1E-1; N.D. Cent. Code § 27-01-09; Okla. St. Ann. tit. 12, § 728; S.D. Codified Laws §1-1-25; Wis. Stat. § 806.245; Wyo. Stat. Ann. § 5-1-111. See also Ariz. R. P. Tribal Ct. Civ. Jgt. 5; Mich. R. Civ. P. 2.615(B); N.D. R. Ct. 7.2; Wash. R. Supr. Ct. 82.5(c); Minn. R. Prac. 10.