



OFFICE OF
INSPECTOR GENERAL
U.S. DEPARTMENT OF THE INTERIOR

INDIAN LAND CONSOLIDATION: PROPER USE OF FUNDING AGREEMENTS WITH TRIBES



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JUL 25 2013

Memorandum

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Subject: Management Advisory – Indian Land Consolidation: Proper Use of Funding
Agreements with Tribes
Report No. WR-EV-BIA-0017-2013

This management advisory, regarding the U.S. Department of the Interior's (DOI) implementation of the land consolidation portion of the *Cobell v. Salazar* settlement, is a part of the Office of Inspector General's (OIG) ongoing effort to monitor and evaluate the funding appropriated to DOI in the settlement. Specifically, we are addressing the tribes' interest to be involved in implementing the Indian land consolidation program and the proper use of funding agreements. We believe these issues will be important to consider when providing funding to tribes for Indian land consolidation.

Background

DOI and tribes participated in seven consultation meetings throughout Indian country during the summer and fall of 2011. One of the recurring themes of these meetings was the tribes' desire to be involved with implementing the Indian land consolidation program. The *Cobell* settlement allows for up to 15 percent of the Indian land consolidation fund to be used for administrative costs. Departmental and tribal officials have discussed the possibility of providing a portion of these administrative funds to participating tribes so that the tribes can become directly involved in implementing certain pieces of the land consolidation process on their respective reservations.

In November 2011, OIG issued a report¹ identifying both the challenges and efficiencies presented by Federal and tribal government involvement in implementing *Cobell's* land consolidation provisions. In the report, we discussed challenges in the areas of data access, data integrity, and privacy concerns. We also acknowledged the administrative and technological benefits provided by Federal involvement and the outreach and incentive benefits provided by tribal involvement.

¹ "Indian Land Consolidation: Tribal Participation in Program Implementation," Report No. WR-EV-BIA-0014-2011. November 2011: <http://www.doi.gov/oig/reports/upload/WR-EV-BIA-0014-2011Public.pdf>.

In January 2007, prior to our reports regarding the *Cobell* settlement, we reported on DOI's use of cooperative agreements and found that nearly two-thirds of the cooperative agreements reviewed should have been procurement contracts.² Subsequent to our report, DOI modified the Departmental Manual to strengthen provisions on instrument selection and compliance reviews. In September 2011, DOI issued a policy that instituted a monitoring protocol for financial assistance programs.

Findings

Instrument Selection

The Departmental Manual requires bureaus and offices to determine and use the appropriate funding instrument when acquiring property and services or providing financial assistance, whether that be a procurement contract, grant agreement, or cooperative agreement. In addition, bureaus and offices are to document files with justification of the appropriate financial assistance instruments. Bureaus are encouraged to seek advice, as needed, from the Office of the Solicitor on the selection of an award instrument. Figure 1 explains the different types of instruments.

² "Proper Use of Cooperative Agreements Could Improve Interior's Initiatives for Collaborative Partnerships," Report No. W-IN-MOA-0086-2004. January 2007: <http://www.doi.gov/oig/reports/upload/2007-G-2005.pdf>.

Funding Instruments

Instrument	Purpose	Bureau/Office Involvement
Procurement Contracts	Acquire by purchase, lease, or barter property or services for the direct benefit or use of the Government. In specific instances, the head of the agency can determine that the use of a procurement contract is appropriate.	Not applicable
Grant Agreements	Transfer of a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States.	No substantial involvement expected
Cooperative Agreements	Transfer of a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States.	Substantial involvement is expected

Figure 1. This chart shows the different types of funding instruments and explains what they do and the level of bureau involvement necessary.

If grant agreements or cooperative agreements are considered, DOI must have the legal authority to provide financial assistance, because unlike procurement contracts, agencies must have express statutory authority to spend money using a grant or cooperative agreement.³ Accordingly, if DOI intends to provide settlement funds via a grant or cooperative agreement, it must identify with as much specificity as possible the particular statutory source of its authority to do so. We noted that the Indian Land Consolidation Act states the Secretary “may enter into agreements . . . with the tribal government that exercises jurisdiction over the land involved or a subordinate entity of the tribal government to carry out some or all of the Secretary’s land acquisition program.”⁴

As shown in Figure 1, cooperative agreements require substantial involvement on the part of the Federal Government. According to the Departmental Manual, a bureau may anticipate substantial involvement when it participates and collaborates with the recipient, helps select project staff, directs or redirects the work, or limits recipient discretion with respect to management processes. Conversely, substantial involvement does not include Government approval of recipient plans, normal exercise of Federal stewardship responsibilities, general statutory requirements, or Government review of performance after project completion.⁵

³ 31 U.S.C. §§ 6301-5.

⁴ 25 U.S.C. § 2212.

⁵ Departmental Manual § 505, Chapter 2.9 B (3).

Scope of Work

The level of involvement by tribes will likely vary, due in part to each tribe's unique priorities and capacity. Agreements with tribes containing a detailed statement of work outlining specific responsibilities of the tribes and DOI help to ensure clear understanding of the respective roles and responsibilities. The Departmental Manual states that grant agreements or cooperative agreements will be structured in a manner that—

1. adequately describes the relationship based upon the degree of involvement of the parties; and
2. defines and allocates respective responsibilities, obligations, rights, and accountability as appropriate to the particular project.

In addition to the scope of work, statements of substantial Federal involvement are a requirement for cooperative agreements. According to the Departmental Manual, bureaus and offices are required to prepare an explicit statement of substantial Federal programmatic involvement that includes the nature, character, and extent of the anticipated Federal involvement for each cooperative agreement. This statement is to be part of the official agreement and file.⁶

Inherently Governmental Activity

As a rule, the Federal Government may not pay an outside entity to perform inherently governmental activities on its behalf. The identification of inherently governmental activities may be more complex when discussing Indian tribes that are also considered sovereign governments. The Office of the Solicitor can help clarify which, if any, activities related to Indian land consolidation qualify as inherently governmental and therefore only Federal personnel may perform them.

As defined in OMB Circular A-76:

An inherently governmental activity is an activity that is so intimately related to the public interest as to mandate performance by Government personnel. These activities require the exercise of substantial discretion in applying Government authority and/or in making decisions for the Government. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements. An inherently governmental activity involves—

1. binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
2. determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic

⁶ Departmental Manual § 505, Chapter 2.8 E (3).

- action, civil or criminal judicial proceedings, contract management, or otherwise;
3. significantly affecting the life, liberty, or property of private persons; or
 4. exerting ultimate control over the acquisition, use, or disposition of United States property (real or personal, tangible or intangible), including establishing policies or procedures for the collection, control, or disbursement of appropriated and other Federal funds.

Single Source Determination

We recognize that there are circumstances where an organization, individual, or tribe may be awarded Federal funds without competition. For instance, such determination may be based on demonstrable criteria such as unique expertise or capacity to receive an award through a cooperative agreement. Bureaus and offices must consider, however, the totality of circumstances in determining whether to authorize a single-source award. Decisions to award funds to a single source without engaging in competition must be able to withstand scrutiny; protect the public interest; and comport with management priorities, objectives, and statutory requirements.

When anticipating a single-source award for \$25,000 and above, the awarding bureau or office must prepare and file a written justification to explain why competition is not practicable, including a statement of which criteria justify the action and why. It must also publish a notice of its intent to make the award in order to provide for transparency.

Legal Review

We understand that the Office of the Solicitor will assist bureaus in review or development of new programs or policies affecting future funding allocations, including grants and cooperative agreements. We also understand that, upon request, the Office of the Solicitor will review and advise the bureau or office if a proposed cooperative agreement or grant is complex or novel, exhibits intellectual property issues, poses potential conflicts of interest, or presents other concerns warranting legal review.

Monitoring

DOI policy seeks to ensure the fiscal and programmatic integrity of its recipients through proactive monitoring of financial assistance programs. Monitoring Federal financial assistance programs promotes good stewardship of awarded funds and ensures that projects are carried out in a manner consistent with the recipient's approved project proposal or work plan. DOI has developed a risk-based portfolio management framework for developing a monitoring strategy that integrates baseline-monitoring activities and focuses limited monitoring resources on higher risk awards. Please refer to DOI's "Financial Assistance Monitoring Protocol" (DIG 2011-03) for additional details on the monitoring requirement.

To assist your efforts in funding participating tribes to implement portions of the land consolidation program, we included the following sources of guidance:

- Departmental Manual § 505, Chapter 2: “Procurement Contracts, Grant and Cooperative Agreements,” <http://elips.doi.gov/elips>;
- 25 U.S.C. § 2212: “Fractional interest acquisition program,” <http://uscodebeta.house.gov>;
- 31 U.S.C. §§ 6301-5: “Using Procurement Contracts and Grant and Cooperative Agreements,” <http://uscodebeta.house.gov>;
- U.S. Department of the Interior, Office of the Solicitor: “Partnership Legal Primer,”^{1st} Edition, September 2004, <http://www.doi.gov/pmb/partnerships/partnership-legal-framework.cfm>;
- Department of the Interior Guidance Release (DIG) 2011-03: “Financial Assistance Monitoring Protocol,” http://www.doi.gov/pam/programs/financial_assistance/upload/DIG-2011-03-Financial-Assistance-Monitoring-Protocol_9-13-11.pdf; and
- OMB Circular A-102: “Grants and Cooperative Agreements with State and Local Governments,” as amended 8/29/1997, http://www.whitehouse.gov/omb/circulars_a102.

Information contained in this advisory will be included in our semiannual report to Congress. If you have any questions regarding this matter, or if we can provide further assistance, please contact me at 202-208-5592.

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