

GAO

Testimony

For Release
on Delivery
Expected at
9:30 a.m. EST
Thursday
October 26, 1989

Bureau of Indian Affairs'
Contract for Management and
Operations of Indian Trust Funds

Statment of
Robert Hunter, Associate General Counsel

Before the
Subcommittee on Environment, Energy and
Natural Resources
Committee on Government Operations
House of Representatives



046868/139859

Mr. Chairman and Members of the Committee:

We are pleased to be here today to discuss the contract awarded by the Bureau of Indian Affairs to the Security Pacific National Bank for accounting, financial, trust and investment services. You previously asked us whether this acquisition should have been conducted under the rules applicable to the acquisition of automatic data processing equipment and services to which we responded in our decision of September 28. You also have asked for our assessment of the Bureau's fundamental authority to contract with a third party for the management and operation of the Indian trust funds. Our testimony today will highlight our decision of September 28 and provide an interim update on the status of our response to your latter question.

The Assistant Secretary-Indian Affairs acting through BIA is responsible for management of the Indian Trust Funds. BIA currently manages approximately \$2.4 billion in trust funds belonging to Indian tribes, individual Indians, Alaska natives and Native Corporations, and irrigation and power projects. The primary sources of the money in the various Indian trust funds are court judgments, income generated from the sale or lease of trust resources such as timber,

oil, gas, rangeland, and water rights, and collections from irrigation and power projects.

We have issued at least 5 reports in recent years discussing the BIA's problems in implementing financial controls and providing effective management of resources. A recent Arthur Andersen & Company audit, issued on March 23 of this year, revealed many deficiencies in the Bureau's management of the trust assets. The objective of the acquisition that is the subject of today's hearing was described by the Bureau as an effort to improve upon its timeliness, accuracy, accountability, control and quality of services to eligible Indian and Native Americans and tribal organizations.

As trustee and manager of the Indian trust funds, BIA historically has performed in-house, with some assistance from the Department of Treasury, all of the trust management functions, including receipt, control, investment and disbursement of trust funds. After BIA determined that private sector institutions might be better able to perform some of the financial trust services BIA has been performing, BIA issued a request for proposals for financial trust services as the first step in the conduct of a contracting-out study under the provisions of Office of Management and Budget Circular A-76. The objective of such a study is to identify and select the most cost effective

method, through a competition between private sector contractors and in-house resources and employees, of obtaining needed services.

The request for proposals issued by BIA stated that the purpose of the contract was to provide BIA integrated external services encompassing cash collection and concentration, investment services, disbursement services, custody of trust fund accounts, distributing earnings, depositing funds into the Treasury, and reporting. The specifications stressed the importance of the vendors' data processing capabilities. Vendors responded with proposals premised on contractual terms and pricing. An in-house proposal was prepared on the basis of the most efficient organization and anticipated costs. The BIA concluded that Security Pacific National Bank had submitted the better private sector offer. The BIA compared Security Pacific's offer to its in-house proposal and concluded that the Bank's offer provided the most cost-effective solution to BIA's requirements. The BIA awarded the contract to Security Pacific on September 14, 1988.

As we noted in our decision, the acquisition of automatic data processing equipment and services by federal agencies is governed by § 111 of the Federal Property and Administrative Services Act, popularly known as the Brooks

Act. The Act gives overall authority for the acquisition of ADP by federal agencies to the Administrator of General Services and provides that the Administrator may delegate this authority. An agency normally would approach the General Services Administration for a delegation of procurement authority prior to initiating a significant ADP acquisition.

The BIA previously indicated that it never considered whether the Brooks Act might apply to this acquisition. In response to a specific question from our Office regarding the applicability of the Brooks Act, the BIA stated that the services requested by the RFP were either transactional or advisory in nature and, therefore, that no delegation of procurement authority was required.

The Brooks Act, as amended in 1986 by the Paperwork Reduction Reauthorization Act, covers the acquisition of services performed making significant use of automatic data processing equipment and makes no exception for what BIA called transactional or advisory services. As we conclude in our decision, this acquisition encompasses services falling within the act, because it requires significant use of automatic data processing equipment, and should have been conducted under the provision of the Brooks Act.

As we also noted in our decision, the Bureau's failure to obtain a delegation of procurement authority from the General Services Administration leaves the Bureau in the position of holding a contract for which it lacks appropriate authority. We reiterate here our recommendation that the Bureau halt work under the contract and explore with the Administrator the resolution of this deficiency.

The other issue you asked us to discuss today concerns BIA's authority to contract with a third party for the management and operation of Indian trust funds. In particular, you asked whether BIA may contract with a third party to disburse Indian trust fund monies. We have not yet completed our legal analysis of this issue and therefore cannot now provide you with a definitive answer to the questions you have raised. However, we are prepared to discuss our preliminary views of these issues based on our analysis to date, and will furnish you with a written legal opinion as soon as it is completed.

The Supreme Court has held that in managing Indian trust funds the United States should be judged by the "most exacting fiduciary standards". Ordinarily, a trustee cannot delegate fiduciary responsibilities that involve the exercise of judgment and discretion. OMB Circular A-76 specifically provides that the "administration of public

trusts" is an inherently Governmental function that should only be performed by Federal employees.

This, of course does not mean that the Government as trustee cannot engage contractors to assist in discharging its trust functions. Indeed, it is BIA's position that its contract with Security Pacific does not involve "any management functions of its Indian trust fund program". BIA maintains that the services it contracted for are nonmanagerial and that "[m]anagement or decision making functions will continue to be a BIA responsibility".

Based on our analysis of this issue to date, we agree, for the most part, with BIA's position. The services BIA has contracted for fall primarily into the following 4 categories:

- 1) Maintaining trust fund accounts, including cash collection and concentrations
- 2) Record-keeping and reporting on trust fund accounts;
- 3) Providing investment advice and executing investment transactions as directed by BIA;

- 4) Making disbursement from trust funds as requested by BIA.

We are not inclined to question BIA's authority to contract for the first three services. First, with respect to the contractor's responsibility to maintain the trust fund accounts and have physical custody of trust fund monies, the Secretary of the Interior, and hence, BIA, is expressly authorized by statute, 25 U.S.C. § 162a, to deposit trust fund monies in such bank or banks that he selects. Second, as a necessary corollary to such authority, the Secretary may require any bank selected as a depository for trust fund monies to keep accurate records of all trust fund transactions and make reports to BIA. Third, while the Secretary of the Interior cannot lawfully delegate his statutory authority under 25 U.S.C. § 162a to determine whether to invest trust funds in public-debt obligations of the United States or other obligations unconditionally guaranteed by the United States to any non-Governmental third-party, the contract does not provide for such a broad delegation of authority. Rather, under the contract, Security Pacific only provides investment advice to BIA; BIA retains full responsibility to make the final trust fund investment decision. Subject to BIA's retention of adequate controls and safeguards to ensure that Security Pacific invests trust fund monies only as instructed, we would not

object to BIA's contracting for investment advice and services.

You also asked us to discuss whether BIA may contract with a third party to disburse Indian trust fund monies. Under the contract, Security Pacific will provide disbursement services only for the Indian tribal trust funds and individual Indian monies (IIM) trust funds while the Treasury Department will continue to perform the disbursement functions for the other types of Indian trust funds covered by the contract. The tribal trust funds are the largest of the Indian trust funds BIA manages, with approximately 1,700 separate accounts for almost 300 different tribes. The IIM trust funds are the second largest category of trust funds covered by the contract, with approximately 300,000 separate accounts maintained for individual Indians, associations of Indians, and Indian corporations.

By statute, only government Disbursing Officers legally can disburse "public money." Historically, we have considered trust funds, including Indian trust funds, to be public money subject to the disbursement requirement. We understand that BIA has now concluded that since amounts in the IIM and tribal trust funds are held in trust for either

specific individuals or tribal entities, they are not public monies.

Further, even if the funds are considered to be U.S. public moneys, we note that the contract provides that the contractor shall only make disbursements "as requested by BIA." Depending on how this provision is implemented, it may be that the essential disbursement function has been retained in BIA and that the role of the contractor is merely ministerial.

Our Office is still in the process of working with the BIA and Treasury to resolve these issues. We will provide you with a copy of our opinion on them as soon as it is available.

Mr. Chairman, this conclude my prepared statement. I will be happy to answer any questions you or members of the Committee may have at this time.