

Special rules apply when contracting with tribes

From casinos, hotels and golf courses to housing, health clinics and industrial facilities, a construction boom is occurring on Indian reservations and other lands owned by Indian tribes. Special legal issues apply to these developments on Indian lands.

As a government, an Indian tribe has broad power within its reservation to make and enforce laws affecting contracts with the tribe and tribal business entities.

An Indian tribe may enter development, construction, design and other contracts itself or through an enterprise operating as a political subdivision of the tribe. Many Indian tribes also do business through tribal government corporations chartered under federal or tribal law, such as the Coquille Economic Development Corp., as well as through nonprofit and for-profit corporations and limited liability companies.

A tribe may do business through various entities, so one of the first things a developer, contractor or designer must do is identify (with care) the tribal contracting entity. It makes a difference whether the contracting entity is the tribe itself, a tribal government corporation, a for-profit or nonprofit corporation or a quasi-independent political subdivision of the tribe.

The person, process and scope of authority to approve contracts typically varies within a tribe depending on which tribal entity is entering into the contract. In simpler terms, a perfectly good contract with tribal entity A does not bind tribal entity B.

Sovereign immunity waiver usually limited

Because of sovereign immunity, a tribe cannot be sued in any court without a clear waiver by Congress or the tribe itself. Congress has not waived tribal sovereign immunity in business matters.

Merely entering into a contract does not waive a tribe's sovereign immunity. Most tribes are unwilling to give a general waiver of tribal sovereign immunity that would obligate all tribal assets to satisfy any single contract. With significant variations from tribe to tribe and transaction to transaction, tribes and tribal business entities are usually willing to waive tribal sovereign immunity on a limited basis.

Among other matters, the limited waiver may identify remedies for breach and assets that are available to satisfy any liability of the tribal contracting entity. The terms of a limited waiver of tribal sovereign immunity are narrowly and strictly construed in favor of a tribe or tribal business entity. A tribal sovereign immunity waiver must be approved in accordance with procedures required by tribal law and any corporate charter or other restriction on such waivers.

A waiver approved by an entity or its officer without or in excess of authority is ineffective. As a result, developers, contractors and design professionals should seek legal advice about the scope of the sovereign immunity waiver and the authority of the tribal entity or officer granting the waiver.

As part of or related to a limited waiver of sovereign immunity, tribes increasingly are willing to approve arbitration clauses for dis-



CONSTRUCTIVE ADVICE

Michael O'Connell and Sean Gay

pute resolution. Such clauses typically specify the matters subject to arbitration, how arbitrators are selected, the rules governing the arbitration and the nature of and limitations on relief the arbitrators may grant.

As with any arbitration clause, issues may arise regarding enforcement of the obligation to arbitrate. There may also be issues with confirmation, entry of judgment, enforcement and modification.

Obtaining business license requires effort

Many tribes require tribal business licenses to do business on their reservations, and obtaining such a license can be costly. Failure to obtain and maintain a tribal business license could bar efforts to seek enforcement of an arbitration clause or award in the event of a dispute.

A somewhat obscure federal law provides the Bureau of Indian Affairs with authority to issue Indian trader licenses. The scope of this law is difficult to ascertain, and most Indian Affairs offices will, when asked, say they no longer issue Indian trader licenses. However, the Indian Traders License Act remains on the books, and it has draconian provisions when applied. For example, in 2000 a Tulalip Tribal Court case relating to a sales-and-service contract with the Tulalip Tribes for photocopy machines held the contract illegal and unenforceable because the vendor did not have an Indian trader license. The court refused to enforce the illegal contract and ordered forfeiture of the photocopy machines.

In the face of the uncertain scope of this statute and the harsh remedies that may be invoked if it applies, one option is to seek an Indian trader license from the Bureau of Indian Affairs. The cost – \$5 – and the time and effort to apply for the license are negligible compared to the consequences of failing to obtain a license when one is required.

The special rules that apply to contracts with Indian tribes and tribal entities have roots in federal Indian law and tribal law which most developers, contractors and designers rarely deal with on public or private projects. This is an area where an ounce of prevention can be worth more than a pound of cure.

Michael O'Connell is a principal and Sean Gay is an associate at the Stoel Rives law firm. O'Connell can be reached at moconnell@stoel.com or 206-386-7692, and Gay can be reached at scgay@stoel.com or 503-294-9239.