

Francis H. (Frank) Larson

Qualifications

Francis H. (Frank) Larson, owner and operator of Frank Larson Consulting, is a member of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians. Mr. Larson is a High School graduate. He is a veteran, having served honorably in the United States Air Force from October 1964 to October 1968. He worked for the Bureau of Indian Affairs (Bureau) from January 1970 to January 2005. During his tenure with the Bureau he worked in a Field Office, Agency Office, Regional Office, and the Central Office in Washington, DC. He worked the majority of his career in contracting, both Commercial contracting and Self-Determination contracting. He worked to implement Public Law 93-638, as amended (The Indian Self-Determination and Education Assistance Act) from its inception in 1975 until his retirement. He was a member of the Bureau team for the Regulation Drafting process on the 1988 Amendment to P.L. 93-638 (P.L. 100-472). During his career he performed as a Field Representative, a Contracting Officer's Representative (COR), a Contract Specialist, a Self-Determination Specialist, a Self-Determination Officer, and a Self-Determination Awarding Official. Throughout his career in Indian Self-Determination he provided training and technical assistance to Bureau and tribal staff. For his last eight years with the Bureau he was the Bureau primary trainer on all aspects of Public Law 93-638, as amended.

Frank Larson possesses knowledge of the Bureau, its operations, and knowledge and expertise in Federal contracting, Public Law 93-638, as amended, and 25 Code of Federal Regulations (CFR) Part 900.

Frank Larson has in-depth knowledge and experience in applying the Federal contracting and self-determination policies, practices, laws and regulations.

Specifically, Frank Larson has extensive knowledge and skill in training on Public Law 93-638, as amended, contracting, and contract administration.

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Report and Statement of Opinions

Re: Case No. 07-C-316

**United States of America v. Menominee Tribal Enterprises,
et al.**

Report No. FLC-2007-001

TASK STATEMENT:

I was asked to review the United States of America v. Menominee Tribal Enterprises (MTE) Complaint Document, in the conduct of this review I also needed to see the relevant contract documents. My task was to review these documents and render opinions as to the impact of Public Law 93-638, as amended, in these matters.

DOCUMENTS REVIEWED:

- United States of America v. Menominee Tribal Enterprises (MTE) Complaint Document [Case No. 07-C-316]
- Contract Documents: Excerpts from -
 - Road Maintenance Contracts:
CTF58X00104 (Awarded February 1995); and
CTF58X00112 (Awarded December 21, 2000)
 - Forest Management Contracts:
CTF58X00108 (Awarded January 1997); and
CTF58X00110 (Awarded November 2000)

ALLEGATIONS:

- MTE filed false or fraudulent claims;
- MTE breached its contractual agreements; and,
- MTE wrongfully expended contract funds.

LIMITATIONS:

- In preparing this report and in expressing my opinions about these matters, I do not express an opinion on the Government's case against MTE.
- I do not make any determinations about the validity of the charges made against MTE.
- My review is limited to an evaluation of P.L. 93-638, as amended, and contracting in general.

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BACKGROUND:

Public Law 93-638, The Indian Self-Determination and Education Assistance Act of 1975 (January 4, 1975; 25 USC 450, et seq.), as amended (law). The regulations implementing this public law are found at 25 CFR, Chapter I, Subchapter M, Parts 273, 275, and 276 and 25 CFR, Chapter V, Part 900, Subparts A through P (regulations).

The Federal Government has historically dealt with Indian tribes as sovereign governmental entities. In addition, the Government has consciously established and maintained a government-to-government relationship with Indian tribes. This is stated in the Congressional Findings provision of the law which states in part "...The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people finds that the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons." [Public Law 93-638, as amended, section 2(a)]

Public Law 93-638, as amended, enables the Federal Government to continue and strengthen the historic and special legal relationship, as well as the government-to-government relationship, that exists between the United States and Indian tribal governments. This law also continues the Federal Governments practice of contracting with Indian tribes for the delivery of services to Indian people. To this end the law has made the following changes to the Federal contracting or acquisition process:

- How it begins;

It is not a Federal Government decision to enter into a contractual relationship. The Indian tribal government starts this process. When an Indian tribal government, through tribal resolution, requests a contract, the Secretary (Secretary of the Department of the Interior or Department of Health and Human Services) must proceed to enter into that

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contract. See Public Law 93-638, as amended, Title I, section 102(a)(1).

This acquisition action does not need to be advertised.

- Waived applicability of the Davis-Bacon Act;

Tribes and Tribal Organizations as contractors or subcontractors can choose not to comply with the Davis-Bacon Act. See Public Law 93-638, as amended, Section 7(a).

- Waived applicability of 31 USC 63;

31 USC addresses Money and Finance, Chapter 63, Defines terms: Contract; Grant; and Cooperative Agreement for the Federal Government. These definitions do not apply to Public Law 93-638 agreements. See Public Law 93-638, as amended, Section 9.

NOTE: For Public Law 93-638 agreements follow the definition of terms in Public Law 93-638. See Public Law 93-638, as amended, Section 4.

- Waived Federal procurement laws and regulations;

Contracts and cooperative agreements under section 102 of the law are not subject to Federal contracting or cooperative agreement laws (or regulations), except to the extent that such laws or regulations expressly apply to Indian tribes. For self-determination construction contracts, Congress waived the applicability of the Office of Federal Procurement Policy Act and the regulations promulgated thereunder (Federal Acquisition Regulations). See Public Law 93-638, as amended, Title I, Section 105(a)(1) and (3).

NOTE: For Public Law 93-638 agreements follow requirements in Public Law 93-638, as amended.

- Authorized self-determination contracts to include provisions for the performance of personal services.

See Public Law 93-638, as amended, Title I, Section 105(g).

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The purpose of Public Law 93-638, as amended, is "... To provide maximum Indian participation in the Government and education of the Indian people; to provide for the full participation of Indian tribes in programs and services conducted by the Federal Government for Indians and to encourage the development of human resources of the Indian people; to establish a program of assistance to upgrade Indian education; to support the right of Indian citizens to control their own educational activities; and for other purposes ..."

STATEMENT OF OPINIONS:

Public Law 93-638, as amended, does not create a "NEW" contracting process. The law does change the existing commercial contracting process. However, the changes that are made by the law are changes to process or procedure, and are changes necessary to enable achievement of the purpose of Public Law 93-638.

Nothing in Public Law 93-638, as amended, allows for non-compliance with the contractual agreement or appropriation law.

In fact, Public Law 93-638, as amended, section 6, provides:

"Whoever, being an officer, director, agent, or employee of, or connected in any capacity with, any recipient of a contract, subcontract, grant, or subgrant pursuant to this Act or the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C. §§ 452 et seq.], embezzles, willfully misapplies, steals, or obtains by fraud any of the money, funds, assets, or property which are the subject of such grant, subgrant, contract, or subcontract, shall be fined not more than \$10,000 or imprisoned for not more than two years, or both, but if the amount so embezzled, misapplied, stolen, or obtained by fraud does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

Regulatory language: 25 CFR, Chapter V, Part 900, Subpart B, 900.3(b)(4) provides:

"The Secretary recognizes that contracting under the Act is an exercise by Indian tribes of the government-to-government relationship between the United States and the Indian tribes. When an Indian tribe contracts, there is a transfer of the responsibility with the associated funding. The tribal contractor is accountable for managing the day-to-day operations of the contracted Federal programs, functions, services, and activities. The contracting tribe thereby accepts the responsibility and

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accountability to the beneficiaries under the contract with respect to use of the funds and the satisfactory performance of the programs, functions, services and activities funded under the contract. The Secretary will continue to discharge the trust responsibilities to protect and conserve the trust resources of Indian tribes and the trust resources of individual Indians."

Also, in *Cherokee Nation of Oklahoma, et al v. Leavitt, Secretary of Health and Human Services, et al.* 543 U.S. 631, 639 (2005) the Supreme Court of the United States found that the Act's language strongly suggests "that Congress, *in respect to the binding nature of a promise*, meant to treat alike promises made under the Act and ordinary contractual promises (say those made in procurement contracts)."

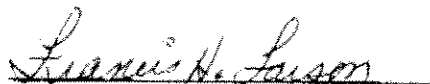
When a contractual agreement has been entered into, that agreement specifies the promises made and agreed to by the parties to the agreement. Each party to the contract has the right to expect the performance agreed to, and each party has the responsibility to perform as specified in the contractual agreement. Public law 93-638, as amended, does not waive or eliminate this basic right and responsibility.

Public Law 93-638, as amended, does not allow either party to the contract to disregard the specific language in the contractual agreement.

Public Law 93-638, as amended, does not allow either party to alter or change the performance elements, the statement of work, the program standards, the contract deliverables, the performance period, the contract amount, or the use of appropriated funds, without negotiation and approval by all parties to the agreement.

Congress, through an appropriation act, provides funding to accomplish a specific purpose. Public Law 93-638, as amended, is not an appropriation act. It does not allow either party to the contract to change or alter the intent of an appropriation act.

Submitted by:


Francis H. (Frank) Larson