

DECISION

Entered
14976 PL II
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-196326

DATE: September 22, 1980

MATTER OF: J & A, Inc.

DIGEST:

1. Indian Self-Determination Act requires Federal agency to include in prime contract for benefit of Indians provision requiring prime contractor to afford preference to Indian-owned firms in award of subcontracts to greatest extent feasible, and requirement is not satisfied by compliance with Buy-Indian Act.
2. Where almost five years elapses from time of enactment of statute before regulation is promulgated requiring Federal agency to include in prime contract for Indians' benefit subcontracting preference for Indian firms, agency may not be excused from implementing statutory requirements because regulation was published after bid opening.

J & A, Inc. (J&A) ~~protests the award~~ of a contract by the Army Corps of Engineers (Corps) under a solicitation for the replacement of an above-ground natural gas distribution system in Barrow, Alaska, with an underground gas system. Pursuant to the terms of an agreement between the Department of the Interior's Bureau of Indian Affairs (BIA) and the Corps, the Corps advertised, awarded and is to administer the construction contract for BIA. The basis for protest is that the Corps did not comply with section 7(b) of the Indian Self-Determination Act, 25 U.S.C. § 450e(b)(2) (1976), in that the prime contract did not include a requirement that Indian organizations and Indian-owned firms be given preference, to the greatest extent feasible, in the award of subcontracts where the prime

Against Contract

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contract with the Federal Government is for the benefit of native Americans. J&A, which alleges that it would be eligible for the cited preference in view of its 51-percent Indian ownership urges this Office to require the Corps to add to the contract the Indian preference in subcontracting provision published at 44 Fed. Reg. 62514 (October 31, 1979) by the Secretary of the Interior to implement the statute. The provision was published after bids on the prime contract were opened; a contract subsequently was awarded notwithstanding the protest.

The protest is sustained.

As an initial matter, the issue of whether the protester is an "interested party" under our Bid Protest Procedures, 4 C.F.R. part 20 (1980), has been raised. We simply point out that J&A, as an eligible subcontractor, has a sufficiently direct and substantial economic interest in urging that the Indian preference should have been included in the contract to qualify as an interested party for purposes of filing a bid protest. See Donald W. Close and Others, 58 Comp. Gen. 297 (1979), 79-1 CPD 134; Optimum Systems, Incorporated--subcontract protest, 54 Comp. Gen. 767 (1975), 75-1 CPD 166.

With respect to the substantive issue raised in the protest, section 7(b) of the Indian Self-Determination Act states in pertinent part:

"Any contract * * * pursuant to this Act * * * 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-

* * * * *

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

It is not disputed that the contract in this case is for the benefit of Indians.

The Corps' position essentially is that its responsibility with respect to promoting Indian participation in the project was fulfilled by complying with the Buy Indian Act, 25 U.S.C. § 47 (1976), in awarding the prime contract. The Buy Indian Act, which like section 7(b) of the Indian Self-Determination Act reflects Congress' intent to further Indian participation in Federal programs conducted for Indians, states:

"So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior."

[The Department of the Interior's policy with respect to implementing the above statute requires that before taking any procurement action, contracting officers determine whether there are any qualified Indian contractors within the normal competitive area that could meet the requirement. Only if none are found may non-Indian contractors be solicited; a qualified contractor for purposes of this policy is one that is totally Indian-owned. 20 Bureau of Indian Affairs Manual (Supp. 2).]

To comply with the Buy Indian Act policy, the Corps requested that BIA investigate the availability of Indian contractors that might be able to perform the prime construction contract. After a three-month investigation, BIA was able to identify only two potential Indian contractors. However, the Corps investigated the potential contractors and found that they did not have the requisite field experience. Accordingly, the Corps advertised the project without restriction.

We do not agree that compliance with the Buy Indian Act and the corresponding BIA implementing regulations through reliance on BIA's investigations relieved the Corps of its responsibilities under section 7(b) of the Indian Self-Determination Act. The Buy Indian Act "preference" as implemented by the Department of the Interior involves the setting aside by the Government of procurements for

participation by firms that are 100-percent Indian-owned, and thus the implementing regulations necessarily require a survey of the competitive area to determine the feasibility of such a set-aside in a particular case. In contrast, section 7(b) of the Indian Self-Determination Act simply mandates that Federal contracts for the benefit of Indians require the prime contractor to afford preference in subcontract awards to firms that may be only 51-percent Indian-owned. Thus the statutes contemplate different preferences and different universes of potential recipients of these preferences. Further, whereas the Buy Indian Act imposes a duty on the Federal Government in the initial procurement stage, the Indian Self-Determination Act requires only that the prime contract require the preference to be implemented by the contractor. In view thereof, we cannot agree that simply because it may not be feasible to set a procurement aside for 100-percent Indian contractors, the requirement of the Indian Self-Determination Act that the prime contract impose a duty on the prime contractor regarding the award of subcontracts can be ignored.

We recognize that, as stated at the outset of this decision, the Secretary of the Interior did not promulgate the Indian preference in subcontracting provision to implement section 7(b) until after bids were opened. However, while we have recognized that the implementation of a statute by the Executive branch takes a reasonable time, B-114835, October 19, 1969, we note that almost five years from the enactment of the statute passed before the statute's requirement was implemented. In addition, almost two years passed from the time we specifically recommended to the Department of the Interior that it definitize the statutory preference. See Department of the Interior--request for advance decision, 58 Comp. Gen. 160, 167 (1978), 78-2 CPD 432.

Under the circumstances, [we do not believe that the publishing of the Secretary of the Interior's implementing preference provision after bid opening here excuses the failure of the agency to impose the contractual duty on the prime contractor required by law in the award of subcontracts. Therefore, we sustain protest.]

Nonetheless, section 7(b) of the Indian Self-Determination Act only requires the preference in the award of subcontracts "to the greatest feasible extent." We have stated that such language confers broad discretionary authority and thus does not require subcontract awards to Indian-owned firms. Id. We note that the prime contract has been awarded to a joint venture that includes a native American concern. Moreover, while the record indicates that all subcontracts already have been awarded to non-Indian firms, the prime contractor asserts that it did give first consideration to Indian-owned enterprises, including J & A, but found them technically unacceptable.

Accordingly, we find that the Congress' purpose reflected in the Indian Self-Determination Act has been substantially met in the procurement despite the non-existence of an express preference requirement in the prime contract. In view thereof, we will not recommend any remedial action with respect to this procurement.

By separate letter, we are advising the Secretary of the Army of the above-discussed procurement deficiency.

Shilton J. Howlett
For the Comptroller General
of the United States