116129 19517

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-199358 DATE: September 24, 1981

MATTER OF: Ritchie-Wick

DIGEST:

1. Regulatory provision that proposals for contracts under the Indian Self-Determination and Education Assistance Act be submitted "well in advance of the desired beginning of support" is not a bar to consideration of a proposal submitted under the act about a week before award was going to be made under a separate competitive solicitation not under the act.

2. Although the Indian Self-Determination and Education Assistance Act directs the Secretary of Health and Human Services to enter into a contract with an Indian tribal organization to carry out the Secretary's functions, authorities and responsibilities in 42 U.S.C. § 2001, which only mentions "maintenance and operation of hospitals and health facilities for Indians," it is not untenable to include construction within the language, since the Davis-Bacon Act wage standards applicable to construction are made applicable to the Indian Self-Determination and Education Assistance Act.

3. Since the Indian Self-Determination and Education Assistance Act directs the Secretary of Health and Human Services to contract with the tribal organization of any Indian tribe that requests to carry out the Secretary's functions, authorities and responsibilities in 42 U.S.C. § 2001, and the Indian Self-Determination and Education Assistance Act authorizes the Secretary to waive

the contracting laws and regulations which the Secretary determines are not appropriate for the purposes of the contract involved or inconsistent with the provisions of the act, competition for the contract with the tribal organization was not required.

4. Solicitation cancellation after receipt of offers for competitive procurement for construction of hospital staff housing quarters at Indian health service hospital and subsequent award of the contract without competition to tribal organization under the Indian Self-Determination and Education Assistance Act are unobjectionable.

Ritchie-Wick, an Alaskan Indian joint venture, protests the Department of Health and Human Services (HHS) cancellation of solicitation No. D10-72 for construction of hospital staff living quarters at the Alaska Area Native Health Service Hospital, Bethel, Alaska, and the award of a contract to the Bethel Native Corporation for the construction under the Indian Self-Determination and Education Assistance Act (Self-Determination Act), 25 U.S.C. § 450g (1976).

We do not find the protest to have merit.

Ritchie-Wick was the successful offeror under the solicitation. Two hours before the contract was to be signed, the solicitation was canceled. Ritchie-Wick contends that it was improper to cancel the solicitation.

As a general rule, cancellation is improper absent a cogent and compelling reason. Scott Graphics, Inc., et al., 54 Comp. Gen. 973 (1975), 75-1 CPD 302. However, a contracting officer's authority to cancel a solicitation is extremely broad and, in the absence of bad faith or an abuse of discretion, a decision to cancel a solicitation will be upheld. Byron Motion Pictures Incorporated, B-190186, April 20, 1978, 78-1 CPD 308. The propriety of a particular cancellation "must stand upon its own facts." Edward B. Friel, Inc., 55 Comp. Gen. 231, 240 (1975), 75-2 CPD 164.

Here, the decision to cancel the solicitation was made because of a proposal received from the Bethel Native Corporation under the Self-Determination Act before the award was made under the solicitation. The Self-Determination Act at 25 U.S.C. § 450g(a) directs the Secretary of Health, Education, and Welfare, redesignated the Secretary of Health and Human Services by 20 U.S.C. § 3508 (Supp. III, 1979), upon the request of any Indian tribe, to enter into a contract with any tribal organization of the Indian tribe to carry out all the Secretary's functions, authorities and responsibilities in 42 U.S.C. § 2001 (1976) unless certain enumerated conditions exist. HHS regulations require that proposals for contracts under the Self-Determination Act be submitted "well in advance of the desired beginning of support." 42 C.F.R. § 36-205(d) (1980). Because the Bethel Native Corporation did not submit its proposal for a contract under the Self-Determination Act until after the receipt of offers under solicitation D10-72 and about a week before the award under the solicitation was going to be made, Ritchie-Wick contends that the Bethel Native Corporation proposal should have been rejected as untimely.

However, neither the Self-Determination Act nor the HHS regulation states any particular time for an Indian tribe to make a request for the transfer of functions from the Secretary to a tribal organization. Therefore, the HHS regulatory provision that tribes should submit proposals well in advance of the desired beginning of support is not a bar to HHS's consideration of the Bethel Native Corporation proposal, but rather a requirement aimed at easing the burden inherent in administering the act.

Since the Self-Determination Act "directs" the Secretary to enter into a contract with an Indian tribal organization to carry out the Secretary's functions, authorities and responsibilities in 42 U.S.C. § 2001 (1976) when an Indian tribe requests, unless a finding is made that certain enumerated conditions exist, HHS considers that it was required to adhere to the Indian tribe proposal when it was received and none of the exceptions were found to be present. We raised a question as to whether

construction was required to be transferred to the Indian tribe, since 42 U.S.C. § 2001 mentions only "maintenance and operation of hospitals and health facilities for Indians." HHS indicated that, while there was some internal disagreement as to the effect of the quoted language, the HHS Office of General Counsel supported the view of the Director of the Indian Health Service and Surgeon General that the language should not be read narrowly, since, among other things, the Davis-Bacon wage standards applicable to construction are made applicable to Self-Determination Act contracts and, therefore, construction must have been intended to be included. We do not find that to be untenable. Where interpretation of a statute is involved, deference is accorded the interpretation of the agency charged with the statute's administration even in the presence of another reasonable view. Vanport Manufacturing Company, B-186559, October 19, 1976, 76-2 CPD 343.

Ritchie-Wick questions the award to the Bethel Native Corporation on a sole-source basis, since, in its view, 25 U.S.C. §§ 1631 and 1633 (1976) (Indian Health Care Improvement Act) and Federal Procurement Regulations required the award to be made on a competitive basis. We do not agree that competition was required. In this case, Public Law No. 96-126, 93 Stat. 954, 973 (1979), provided for fiscal year 1980 $74,302,000 for construction--

> "* * * of health and related auxiliary facilities, including quarters for personnel * * * as authorized by [1] section 7 of the Act of August 5, 1954 (42 U.S.C. § 2004a), [2] the Indian Self-Determination Act and [3] the Indian Health Care Improvement Act * * *."

We have held that the total amount of a lump-sum appropriation may be applied to any of the programs or activities for which it is available in any amount, absent further restrictions provided by the appropriation act or another statute. LTV Aerospace Corporation, 55 Comp. Gen. 307, 318-319 (1975), 75-2 CPD 203. Since Public Law No. 96-126 is an unrestricted lump-sum appropriation funding HHS activities under three separate acts, including the

Self-Determination Act, the funds were legally available to finance the Self-Determination Act expenditure alone. Therefore, the provisions of sections 1631 and 1633 of the Indian Health Care Improvement Act are not germane. Further, the Federal Procurement Regulations requirement for competition did not have to be followed, since the Self-Determination Act directs the Secretary to contract with the tribal organization of any Indian tribe that requests it, unless conditions not present here are found, and authorizes the Secretary to waive contracting laws or regulations which the Secretary "determines are not appropriate for the purposes of the contract involved or inconsistent with the provisions of [the Self-Determination Act]." 25 U.S.C. § 450j(a) (1976). See also 41 C.F.R. § 36.216(a) (1980) providing for waiver.

Finally, Ritchie-Wick contends that the Federal Grants and Cooperative Agreements Act, 41 U.S.C. § 503 (Supp. III, 1979), requires that the procurement be approached as a contract rather than as a grant. We do not find HHS to be in disagreement with that view, since HHS used the contracting authority of the Self-Determination Act, 25 U.S.C. § 450g, rather than the grant authority, 25 U.S.C. § 450h(b), to make the award to the Bethel Native Corporation. As indicated above, HHS is authorized to waive competitive procedures in making awards under the Self-Determination Act.

In Boyer, Biskup, Bonge, Noll, Scott & Associates, Inc., 55 Comp. Gen. 765 (1976), 76-1 CPD 110, we considered the requirements of 25 U.S.C. § 450f, a parallel of section 450g of the Self-Determination Act. We concluded that the decision to cancel a procurement and proceed instead with a contract to a tribal organization under the Self-Determination Act was not objecticnable because the act limited the power to decline to enter a Self-Determination Act contract to situations where a stated statutory condition was found to be present, which was not the case.

Likewise, we find the HHS cancellation of solicitation No. D10-72 and the subsequent award to the Bethel Native Corporation to be unobjectionable. Accordingly, the protest is denied.

Shilton J. Dorolan

Acting Comptroller General
of the United States