

**DECISION**



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

**FILE:** B-209169

**DATE:** October 21, 1982

**MATTER OF:** DeRoche & Thomas Construction

**DIGEST:**

1. Protest alleging agency improperly refused to negotiate with protester for contract is untimely because it was not filed within 10 working days of knowledge of basis of protest.
2. Whether awardee is complying with contract provision providing preference for subcontracting with Indian-owned firms is a matter of contract administration, which is the responsibility of the procuring activity, not GAO.

DeRoche & Thomas Construction (D&T) protests the award of a contract for the construction of housing units (Projects 8-22 and 8-23) to Mr. Knowlton Brown by the local Blackfeet Indian Housing Authority with the approval of the Department of Housing and Urban Development (HUD). D&T contends that the contracting activity improperly refused to negotiate with it for the contract and that the contractor has violated the Indian Self Determination and Education Assistance Act, 25 U.S.C. § 450e(b) (1976). We dismiss the protest because it is in part untimely and in part involves a matter of contract administration which we do not review.

The initial solicitation for this contract was restricted to Indian-owned companies and provided that preference in the award of subcontracts was to be given to Indian organizations and Indian-owned firms. According to D&T, it submitted the lower bid of the two Indian-owned firms who responded, but its bid exceeded the estimated construction cost of the project. D&T states that the housing authority then "turned down" D&T's request to negotiate a contract. The agency advises that it canceled the solicitation on January 29, 1981.

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The contract was then resolicited and opened to all bidders. The apparent low bidder, Mr. Brown, was awarded the contract on March 25, 1981. According to the protester, Mr. Brown's bid was below the estimated contract cost because he believed that under the laws of the state of his residence (Utah), he would not have to comply with the solicitation provisions regarding the wage scale for construction laborers as set under the Davis-Bacon Act, 40 U.S.C. § 276a, and with a provision on subcontracting with Indian-owned firms. The protester further states that when Mr. Brown learned that he would have to comply with these solicitation provisions, he filed a protest with HUD, which the agency denied. D&T adds that notwithstanding HUD's denial of the protest, the agency granted Mr. Brown additional funding in order to allow him to complete the contract in accordance with the solicitation.

We are informally advised by HUD that while the solicitation incorporated the Indian Self-Determination and Education Assistance Act requirement, it did not incorporate the Davis-Bacon wage scale. Therefore, the Authority and Mr. Brown agreed to a negotiated change under which the agency granted Mr. Brown additional funding in exchange for his commitment to meet the Davis-Bacon wage scale requirements. The protester contends that under this changed contract Mr. Brown has not fully and in good faith complied with his obligation to subcontract with Indian-owned firms to the greatest extent feasible.

There are two basic concerns raised in D&T's protest. First, D&T contends that the contracting activity improperly refused to negotiate with it for this contract under the original solicitation. This contention is clearly untimely and not for consideration on the merits. To be timely a protest must be filed with our Office no later than 10 working days after the basis for protest was known. ~~4 C.F.R.~~ § 21.2(b)(2) (1982). The contracting activity decided not to negotiate with D&T and to cancel the original solicitation in January 1981, but D&T did not file its protest with our Office until September 21, 1982.

Second, D&T contends that Mr. Brown has failed to adhere to the preference for Indian-owned companies in the awarding of subcontracts. D&T states that Brown has selected non-Indian firms as subcontractors over Indian-owned firms even though prices are comparable. D&T adds

that by awarding this contract to a contractor who has not aided employment opportunities for Indians, the local Indian housing authority acted contrary to the purpose for which it was created, as well as the purpose of the Self-Determination and Education Assistance Act.

Mr. Brown made a commitment in his bid to abide by the provision on subcontracting practices and he is obligated to comply with that commitment. Whether Mr. Brown actually complies with his commitment is a matter of contract administration, which is the responsibility of the procuring agency, not our office. Blast-It-All, Inc., B-207381, May 19, 1982, 82-1 CPD 481. In addition, HUD has advised our Office that D&T, an Indian-owned firm, has in fact received a subcontract from Mr. Brown under this contract.

The protest is dismissed.

*Harry R. Van Cleve*  
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Acting General Counsel