

DECISION



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

FILE: B-209712

DATE: July 26, 1983

MATTER OF: Association of Village Council Presidents

DIGEST:

1. Indian association whose members include potential bidders is an interested party under GAO's Bid Protest Procedures to protest against an award to a non-Indian firm.
2. Where doubt exists as to when the protester received a letter from the Government indicating that award of a contract for roofing construction had been made to a non-Indian firm, which was basis for protest, the timeliness of the subsequent protest to GAO is resolved in favor of Indian association.
3. Requirement in section 7(b) of the Indian Self-Determination and Education Assistance Act that a prime contract for the benefit of Indians require the prime contractor to afford preference to Indian-owned firms in award of subcontracts to the greatest extent feasible, does not apply to the Small Business Administration (SBA) as a "prime contractor" awarding subcontracts under the Small Business Act's section 8(a) program. The SBA is only a conduit in the section 8(a) award process between the Federal agency whose needs are in issue and the firm that will meet those needs, and section 7(b) clearly contemplates that the entity actually performing the contract give preference to Indian firms in awarding subcontracts.

This protest concerns a contract between the Department of the Interior, Bureau of Indian Affairs (BIA), and the Small Business Administration (SBA) to perform roofing alterations at the BIA's headquarters facility in Bethel, Alaska, and the subsequent subcontract award to Comanche Corporation, a non-Indian firm, pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (Supp. IV 1980). Association of Village Council Presidents (AVCP), an Indian tribal organization, protests that BIA and SBA

failed to comply with section 7(b) of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450(e)(b)(2) (1976), as implemented by the Department of the Interior's regulations, in that Indian organizations and Indian-owned firms were not given preference, to the greatest extent feasible, in the award of the subcontract. Specifically, AVCP states that BIA and SBA are bound by section 7(b) to select an Indian 8(a) firm unless no eligible Indian 8(a) firm is available. We deny the protest.

Interested party

As a preliminary issue, BIA suggests that AVCP is not an "interested party" qualified to raise this protest under our Bid Protest Procedures, 4 C.F.R. § 21.1 (1983).

In determining whether a protester satisfies the interested party criterion, our Office will examine the degree to which the interest is both established and direct. In the course of such examination, we consider the nature of the issues raised and the direct or indirect benefit or relief sought by the protester. ABC Management Services, Inc., 55 Comp. Gen. 397 (1975), 75-2 CPD 245. The appropriate interest is present here, based on the protester's representation that the issue raised involves the economic interests of its members, who are identified as "Alaska Native Contractors," any of which could have raised this protest issue on its own. While BIA argues that AVCP should specify which firms it represents, our Bid Protest Procedures do not impose such a requirement. See Association of Soil and Foundation Engineers, B-199548, September 15, 1980, 80-2 CPD 196.

BIA also raises questions regarding AVCP's "standing to sue." However, we do not equate the concept of an interested party with the concept of standing to sue as developed by the courts. Rosendin Electric, Inc., 60 Comp. Gen. 271 (1981), 81-1 CPD 119.

Timeliness

Our Bid Protest Procedures provide that a protest such as this must be filed not later than 10 working days after the basis for protest is known or should have been

known, whichever is earlier. 4 C.F.R. § 21.2(b)(2). BIA, by letter dated October 12, 1982, invited AVCP to a pre-construction conference between BIA and Comanche which BIA believes put AVCP on notice that an award had been made to a non-Indian firm. BIA suggests that AVCP received the letter before October 19, which was 10 working days before the protest was filed on November 2, and therefore questions the timeliness of the protest.

AVCP asserts that it filed the protest in a timely manner, and BIA acknowledges that the record contains no evidence indicating when AVCP received BIA's letter. Further, BIA does not dispute AVCP's contention that a severe snowstorm delayed normal mail delivery during this period. Where doubt exists as to when a protester knew or should have known the basis for protest, we resolve that doubt in favor of the protester. See Dictaphone Corporation, B-193614, June 13, 1979, 79-1 CPD 416. Therefore, we will consider AVCP's protest on the merits.

The Section 8(a) award

In response to advice from the BIA contracting officer about the possibility of a section 8(a) award for this effort, SBA located a qualified 8(a) firm, Comanche, and formally requested the award of a contract to SBA under the 8(a) program. Under this program, established pursuant to section 8(a) of the Small Business Act, a contracting officer is authorized, in his discretion, to let a contract to SBA, and SBA then arranges for the performance of the contract by letting a subcontract to a socially and economically disadvantaged small business concern.

After negotiations concerning contract performance were completed between SBA, BIA, and Comanche, the contract and 8(a) subcontract were awarded to SBA and Comanche, respectively. The contract and the subcontract contained the Indian-preference clauses concerning employment and subcontracts found in Interior's regulations at 14 C.F.R. §§ 14-7.5002 and 14-7.5003 (1982), as required by that agency's regulation at 14 C.F.R. § 4-1.354(b). These regulations implement section 7(b) of

the Indian Self-Determination and Education Assistance Act. That section states:

"Any contract, subcontract, grant, or subgrant 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 --

"(1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and

"(2) preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises * * *."

AVCP does not challenge the decision by BIA to contract pursuant to the section 8(a) program. AVCP does argue, however, that the section 7(b) preference applies to a prime contractor, so that SBA had to afford preference in the award of the subcontract to Indian enterprises. AVCP interprets the requirement for a preference "to the greatest extent feasible" as requiring SBA to award the 8(a) subcontract to an Indian 8(a) firm unless no qualified Indian 8(a) firm is available to perform the contract work.

Because of the nature of the section 7(b) preference and the section 8(a) program, we do not agree with AVCP that section 7(b) applies to SBA as a prime contractor awarding a section 8(a) subcontract.

We think it is clear that Congress intended to impose the Indian preference requirement on the prime contractor that would perform the work under the contract. As implemented by Interior's regulation, the preference contemplates efforts such as establishing an Indian preference program, including recruitment, appropriate advertisement of employment opportunities and, significantly, limiting

subcontracting opportunities solely to Indian firms by soliciting bids initially only from Indian firms in the performance of the work. These efforts essentially involve a systematic, continuing effort on the part of the prime contractor during the term of the contract to grant the various Indian preferences specified. SBA's role in the section 8(a) program, however, while nominally that of a "prime contractor," actually is that of a conduit between the contracting agency that has a requirement that can be met by a small disadvantaged business, and that business; the only sense in which SBA is expected to "perform" the contract is by subcontracting the work to an eligible small business concern. See Soil Conservation Service and Small Business Administration Contract No. AG18scs-00100, B-185427, September 21, 1977, 77-2 CPD 208. This is especially so since SBA's role is very limited under the 8(a) program after award of the contract in that authority and responsibility for administration of the subcontract is delegated to the requiring agency, here BIA. It therefore would be literally impossible for SBA to carry out the detailed and continuing Indian preference provisions contained in its prime contract with a Federal agency, so that we do not believe it is reasonable to interpret the clauses as applicable to SBA.

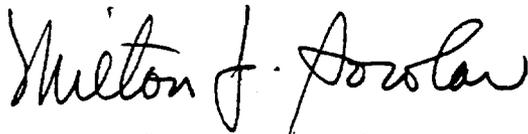
Thus, we believe the section 7(b) preference necessarily is directed at the subcontracting activities of Comanche, the section 8(a) "prime contractor." As to the extent of Comanche's duty pursuant to the section 7(b) preference--the firm's 8(a) contract contains all applicable Indian preference provisions--we have held that section 7(b) does not require subcontract awards to Indian firms. Rather, we have stated that, in our view, the language of section 7(b) "to the greatest extent feasible" confers broad discretionary authority both on a Federal agency in selecting a contractor (in a non-section 8(a) procurement) and the contractor (here, Comanche) in selecting subcontractors. Department of the Interior--request for advance decision, 58 Comp. Gen. 160, 167 (1978), 78-2 CPD 432.

AVCP, citing other statutes and non-section 7(b) court decisions that involve mandatory language similar to section 7(b)'s, argues that our reading of the section 7(b) mandate is wrong; the protester contends that the

language "to the greatest extent feasible" requires subcontract awards to an Indian firm if there is one qualified and available to perform. We need not address the matter, however. First, SBA's contract with Comanche imposes, in our view, significant and stringent Indian-preference subcontracting requirements in accordance with Interior's section 7(b) regulations; these requirements in effect mandate subcontract awards to Indian enterprises consistent with the efficient performance of the contract. Second, AVCP does not suggest that Comanche is not being required to take, or is not taking, the maximum effort to subcontract with Indian firms.

Accordingly, we conclude that the section 7(b) preference does not apply to SBA in awarding section 8(a) subcontracts, and we have no basis to object to the section 8(a) firm's implementation of the preference.

The protest is denied.

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Comptroller General
of the United States