

DECISION

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

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P2-II

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FILE: B-215793

DATE: August 20, 1984

MATTER OF: Kickapoo Tribe

DIGEST:

Provision in the Highway Improvement Act of 1982 that the Secretary of the Interior "may" award certain contract for construction on Indian reservation roads to Indian tribal concerns "as deemed advisable" does not mandate award of bridge construction contracts to such concerns.

The Kickapoo Tribe in Kansas protests the advertisement by the Bureau of Indian Affairs (BIA) of a solicitation for construction of three concrete bridges on the Kickapoo reservation. The Tribe contends that BIA is required by law to award a contract for the work to the Kickapoo Construction Company, a tribal enterprise. We summarily deny the protest.

BIA initially awarded a contract to the Postoak Company for the first bridge to be built. The project was stopped when a Bureau official noted that the Kickapoo Tribal Council had not issued a proper resolution agreeing to a contract with Postoak, which the tribal government constitution requires. BIA subsequently issued a competitive solicitation for the construction.

The Tribe claims the contract award should have been made to the Kickapoo Construction Company pursuant to the Federal Lands Highways Program at section 204 of title 23 of the United States Code (1982). Title 23 concerns construction of the federal-aid highways systems, and section 204 provides:

"(b) . . . Funds available for . . . Indian reservation roads shall be used by the Secretary of the Interior to pay for the cost of construction and improvement thereof. In connection therewith, . . . the Secretary of the Interior

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. . . may enter into construction contracts and such other contracts with [an] Indian Tribe as deemed advisable

"(e) . . . The provisions of the 'Buy Indian' Act . . . and the provisions of section 7(b) of the Indian Self-Determination and Education Assistance Act of 1975 . . . should apply to all funds administered by the Secretary of the Interior which are appropriated for the construction and improvement of Indian reservation roads."

The Tribe argues that this language mandates award of contracts like the one here to Indian tribal contractors.

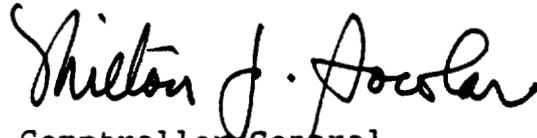
Initially, we think it is questionable whether the provision's reference to "Indian reservation roads" encompasses bridges, since section 101 of title 23, which provides the definition for the title, does not mention "bridges" in defining "Indian reservation roads." We further note that prior to the establishment of the Federal Lands Highways Programs by the Highway Improvement Act of 1982, Pub. L. No. 97-424, § 126, 96 Stat. 2114 (1983), in referring to and defining "Indian reservation roads" title 23 included an express reference to "bridges." See 23 U.S.C. §§ 101 and 208 (1976). While the legislative history on the Highway Improvement Act of 1982 is not clear on the matter, the Congress' intent in deleting that reference arguably was to eliminate bridge construction or repair from coverage in the Federal Lands Highways Program.

Even assuming that the statute applies to the bridge construction involved here, we do not agree that the quoted language mandates award of contracts to Indian firms. Paragraph (b) of 23 U.S.C. § 204 clearly leaves to the discretion of the Secretary involved the decision whether it is "advisable" to contract with an Indian tribe.

As to paragraph (e), nothing in the Buy Indian Act, 25 U.S.C. § 47 (1982), which gives the Secretary of the Interior broad discretionary authority to negotiate contracts exclusively with Indian contractors, requires that particular procurements be set aside for Indians, or that a BIA contract be directed to any particular Indian business concern. See Navajo Food Products, Inc., B-202433, Sept. 9, 1981, 81-2 CPD ¶ 206. In this respect, our Office has held that we therefore will not review individual BIA decisions not to limit procurement to Indian firms absent a prima facie showing that there has been an abuse of the broad discretion conferred by the Buy Indian Act. See American Indian Technical Services, Inc., B-211138, April 14, 1983, 83-1 CPD ¶ 406.

Finally, we point out that section 7(b) of the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450e(b), referenced in paragraph (e) of 23 U.S.C. § 204, establishes a preference for Indian-owned firms in the awards of certain subcontracts, and does not concern prime contract awards. See J & A, Inc., 59 Comp. Gen. 739 (1980), 80-2 CPD ¶ 215.

The Tribe's protest is based only on what we have found is an erroneous reading of 23 U.S.C. § 204. The protest therefore is denied.



Acting Comptroller General
of the United States