

DECISION

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

USKOP
PL II

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FILE: B-214711

DATE: August 20, 1984

MATTER OF: Calista Corporation

DIGEST:

1. Indian Self-Determination and Education Assistance Act mandates that the Secretary of Health and Human Services award a contract for the construction of an Indian health facility to tribal construction organization where the tribe requests it, and provides authority for such a sole-source award.
2. Whether a prospective construction contractor can obtain performance and payment bonds is a matter of responsibility. GAO will not review a contracting agency's affirmative responsibility determination absent circumstances not present here.
3. Whether an awardee complies with contractual provisions requiring preferences for subcontracting with Indian-owned firms and for employing Indians is the procuring agency's responsibility in administering the contract, not GAO's.

Calista Corporation protests the sole-source award of a contract to construct a hospital in Dillingham, Alaska that will provide health care for Native Alaskan Indians. The Alaska Area Native Health Service, Department of Health and Human Services (HHS), awarded the contract to an Alaskan Native tribe's construction corporation, at the tribe's request, pursuant to section 103 of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450g (1982). That statute directs the Secretary of HHS, upon the request of any Indian tribe, to enter into a contract with any tribal

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organization to carry out the Secretary's functions relating to the maintenance and operation of hospital and health facilities for Indians.

We deny the protest in part and dismiss it in part.

The protester raises several objections to the award, contending that this project is outside of the scope of 25 U.S.C. § 450g; that the contract was awarded on a sole-source basis without regard to the availability of competition; and that the award is inconsistent with the policy of the Buy Indian Act, 25 U.S.C. § 47 (1982). The protester also complains that the tribal construction corporation lacks the ability to obtain performance and payment bonds, and that the corporation plans to subcontract or enter into a joint venture with a non-Native firm.

The protester maintains that 25 U.S.C. § 450g was not intended to apply to major construction projects. This Office, however, already has deferred to HHS's interpretation of the statute as mandating the award of a construction contract to a native tribal organization. See Ritchie-Wick, B-199358, Sept. 24, 1981, 81-2 CPD ¶ 248. That decision also involved a protest against the award of a contract to a tribal organization, as requested by the tribe, although for the construction of hospital-staff living quarters at the Alaska Area Native Health Service Hospital in Bethel, Alaska. We therefore deny this portion of the protest.

We also deny the aspect of the protest objecting to the sole-source award. As the Ritchie-Wick decision explains, the general procurement law requirement for maximum practicable competition, and its corollary prohibition against sole-source awards where adequate competition is available, are not applicable to awards made pursuant to 25 U.S.C. § 450g. The reason is that the statute directs the Secretary of HHS to contract with the tribal organization of any tribe that requests it, thus precluding competition. Moreover, the statute expressly authorizes the Secretary to waive contract laws or regulations she determines to be inappropriate for the purposes of the contract involved or to be inconsistent with the provisions of the statute.

The protester's complaint that HHS's award is inconsistent with the policy of the Buy Indian Act, which gives the Secretary of the Interior broad authority to contract exclusively with Indian-owned firms, American Indian Technical Services, Inc., B-211138, April 14, 1983, 83-1 CPD ¶ 406, apparently is based on the view that major projects to benefit Native Alaskans should be awarded through a competitive procurement process involving Native-owned firms. This concern is not germane to the propriety of HHS's award, however, since it is not the Buy Indian Act that applies to this procurement, but the express requirement in 25 U.S.C. § 450g that the Secretary of HHS award a contract to the tribal organization of any tribe requesting such an award.

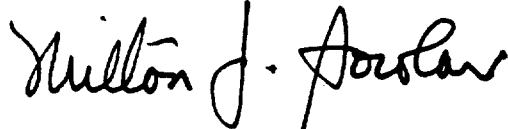
We dismiss the protester's remaining objections, which involve the contractor's ability to obtain performance and payment bonds, and its alleged intention to subcontract or enter into a joint-venture with a non-Native firm, since those objections involve matters we will not review except under limited circumstances not present here.

The ability of a prospective contractor to obtain bonds involves a matter of responsibility, that is, the prospective contractor's capability of meeting its contractual obligation. Whether the tribal construction corporation has such capability is primarily a matter for HHS's determination under both general federal procurement law, see Harris Systems Pest Control, Inc., B-198745, May 22, 1980, 80-1 CPD ¶ 353, and under 25 U.S.C. § 450g, which states that the Secretary of HHS may decline to enter into a contract requested by an Indian tribe if he finds that the tribal organization lacks necessary components of contract performance. Our Office does not review affirmative determinations of responsibility unless either there is a showing of possible fraud on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Harris Systems Pest Control, Inc., supra. Neither exception applies here.

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Regarding the contractor's purported intention not to utilize Indian-owned firms to perform the contract, section 7(b) of the Indian Self-Determination and Education Assistance Act provides that any contract made pursuant to 25 U.S.C. § 450g must require the contractor to subcontract with Indian-owned economic enterprises or Indian organizations to the greatest extent feasible. 25 U.S.C. § 450e(b). (An Indian-owned enterprise is defined as one constituted of not less than 51 percent Indian ownership.) Whether or not a contractor actually complies with the contractual obligation to do so is a matter of contract administration, which is the responsibility of the procuring agency, not our Office. DeRoche & Thomas Construction, B-209169, Oct. 21, 1982, 82-2 CPD ¶ 358.

The protest is denied in part and dismissed in part.



Acting Comptroller General
of the United States