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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20541**

*L. Kozlowski
Proc I*

FILE: B-187082

DATE: December 14, 1976

**MATTER OF: Means Construction Company and Davis Construction
Company, a joint venture**

DIGEST:

1. No clear abuse of agency discretion as to whether to invoke authority to negotiate a contract without competition with an Indian concern under "Buy Indian Act" (25 U.S.C. § 47) is found where agency relied on Tribal resolution recommending procurement by formal advertising.
2. Agency's internal policy memorandum implementing "Buy Indian Act" which allegedly required sole-source negotiation with protester (Indian concern) does not establish legal rights and responsibilities such as to make actions taken in violation of memorandum illegal.

The Department of the Interior, Bureau of Indian Affairs (BIA), issued invitation for bids (IFB) No. BIA0150-76-12 for construction of the Standing Rock Boarding School, Fort Yates, North Dakota. Subsequent to issuance, preliminary discussions were held with Means Construction Company on the possibility of sole-source negotiation and award under the "Buy Indian Act," 25 U.S.C. § 47 (1970). However, the BIA decided to procure by open competition. Means Construction Company and Davis Construction Company (both 100-percent Indian-owned and controlled businesses), a joint venture, protested the action.

The main thrust of the protest is that provisions of the "Buy Indian Act" are mandatory in nature and preclude open competition on this project.

On July 2, 1976, addendum No. 6 to the IFB was issued which reestablished a bid opening date which had been postponed indefinitely. The decision not to procure under the "Buy Indian Act" was formalized in a letter to the protester dated July 8, 1976. Since the protest was not filed (received) in our Office until July 28, 1976, more than 10 days after either date, the Department of the Interior has questioned the timeliness of the protest under our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1976). In this connection the protester alleges that (1) it never received the amendment, and (2) the letter was not received until July 14. Therefore, we will hear the protest on the merits.

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The "Buy Indian Act" reads as follows:

"So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior."

This provision permits negotiation of contracts with Indians to the exclusion of non-Indians. 41 C.F.R. § 14H-3.215-70 (1976). The Secretary of the Interior delegated his authority under the act to the Commissioner of Indian Affairs by Secretarial Order 2508.

Contrary to protester's view, the law and regulation do not require that awards be made to Indians, but only permit such awards if the Commissioner of Indian Affairs decides to invoke the authority of the "Buy Indian Act." We held in 50 Comp. Gen. 94 at 96 (1970) that the "Buy Indian Act" confers a considerable degree of discretion upon the Secretary of the Interior in purchasing the products of Indian industry. In fact, this provision has been recognized as authorizing negotiations with Indian industries of contracts which would otherwise have been subject to requirements for formal advertising. In view of the broad discretion afforded the Secretary of the Interior, we believe the same rationale applies to decisions not to invoke the authority of the "Buy Indian Act." See B-167841, December 18, 1969. In the absence of clear abuse of such discretion, we would not object to the preference given pursuant to the act or alternatively the decision not to employ the authority to negotiate. See 37 Comp. Gen. 368 (1957); B-167841, supra.

By resolution dated June 10, 1976, the Standing Rock Sioux Tribal Council stated its concern over the assurance of quality construction on the project and recommended that the Commissioner of Indian Affairs use formal advertising to effect that goal. The Commissioner referred to and clearly considered the Tribal resolution in his decision to procure by formal advertising. According to BIA this was in conformity with the Bureau's policy to include Tribal input in the major decisions with respect to Indian school projects, and, in our view, did not constitute a clear abuse of discretion.

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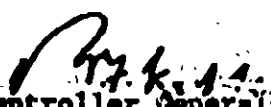
The protestor, however, contends that the following language contained in 20 Bureau of Indian Affairs Manual (BIAM) Bulletin 1, March 3, 1976, is mandatory in nature and required negotiation with and award to it:

"* * * Therefore, the purpose of this Bulletin is to briefly state the Bureau's policy on the use of the 'Buy Indian Act,' pending publication of regulations dealing therewith in the Bureau's Procurement Regulations (41 CFR 101-11.6).

"It is the Bureau's policy that all purchases or contracts be made or entered into with qualified Indian contractors to the maximum practicable extent. Before taking any procurement action, contracting officers shall first determine if there are any qualified Indian contractors within the normal competitive area that can fill the procurement requirement. Non-Indian contractors may be contacted only after it has been determined that there are no qualified Indian contractors within the normal competitive area that can fill or are interested in filling the procurement requirement."

The Bulletin is an internal memorandum which expresses BIA's policy on the implementation of the "Buy Indian Act." Due to the degree of discretion conferred by the statute and regulation, we must regard the provisions of the Bulletin as matters which do not establish legal rights and responsibilities such as to make actions taken in violation of the memorandum illegal and subject to objection by our Office. See 43 Comp. Gen. 217 (1963); American Telephone and Telegraph Company, B-179285, February 14, 1974, 74-1 CPD 72.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States