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DECISION

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

FILE: B-200339 DATE: May 29, 1981

MATTER OF: Vallie Enterprises

DIGEST:

1. Buy Indian Act, 25 U.S.C. § 47 (1976), permits negotiation of contracts exclusively with Indian firms for Indian products at discretion of Secretary of Interior. GAO will not review decision not to limit procurement to Indian firms absent clear showing of abuse of discretion.

2. Protest to GAO alleging solicitation improprieties apparent prior to closing date for receipt of initial proposals filed after that date is dismissed as untimely. Fact that contracting activity received copy of protest one day before proposals were due is not relevant since filing of protest directed to GAO means receipt at GAO for timeliness purposes.

3. Protester was not prejudiced by contracting officer's improper public disclosure of offerors' prices, since protester's offer was technically unacceptable, and firm thus had no chance for award.

Vallie Enterprises protests certain matters regarding request for proposals (RFP) A00-149 issued by the Department of the Interior's Bureau of Indian Affairs (BIA) for abstracting, examining and curing titles to land administered by BIA. Vallie contends that the procurement should have been set aside for Indian-owned firms such as Vallie under the Buy Indian Act, 25 U.S.C.

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§ 47 (1976); that the solicitation includes a number of terms associated with formally advertised procurements "which created tremendous confusion as to what set of rules applied for competitive purposes"; that the RFP's evaluation criteria included matters which properly should have been reserved for consideration in determining whether the successful offeror was a responsible firm; that offerors were not afforded adequate time to prepare their proposals; and that price proposals received in response to the RFP improperly were read aloud in the presence of all the offerors.

We will not consider the protest that the procurement should have been set aside in view of the broad discretion given the Secretary of the Interior by the Buy Indian Act in that respect. We dismiss the protest on the other matters apparent from the RFP as issued because they were not timely raised in accordance with our Bid Protest Procedures, 4 C.F.R. part 20 (1980). Finally, we find that Vallie was not prejudiced by the public reading of offerors' prices.

The Buy Indian Act, which reflects Congress' intent to further Indian participation in Federal programs conducted for Indians, states:

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

We have recognized that the act permits the negotiation of contracts with Indians to the exclusion of non-Indians. See Means Construction Company and Davis Construction Company, a joint venture, 56 Comp. Gen. 178 (1976), 76-2 CPD 483; see also 41 C.F.R. § 14H-3.215-70 (1980), the regulation promulgated by the Secretary of the Interior to implement the act. The Department of the Interior's policy in this respect requires contracting with qualified Indian firms to the maximum extent practicable; non-Indian firms may be contacted only after it has been determined that there are no qualified Indian contractors within the normal competitive area that can meet the Government's requirement and are interested in doing so. 20 BIA Manual 2.1.

The record indicates that BIA's requirement had been the subject of RFP A00-147, also an unrestricted solicitation, which was canceled after proposal evaluation because BIA decided that the RFP's language was ambiguous. By memorandum of July 29, 1980, the procuring activity advised the Commissioner of Indian Affairs that it was going to resolicit the requirement, and requested a waiver of the Buy Indian Act restriction policy because only one Indian firm had responded to RFP A00-147, and that firm had neither scored well on technical factors nor offered the lowest price. The request was granted two weeks later.

The RFP cites 41 U.S.C. § 252(c)(4) as the authority to negotiate the purchase in lieu of using formal advertising. That provision allows the negotiation of contracts "for personal or professional services," and is one of the exceptions to the statutory requirement that the Government make purchases by formal advertising. Vallie, which first raised this issue with BIA before proposals were due, points out that 41 U.S.C. § 252(c)(15) allows negotiation where "otherwise authorized by law," e.g., the Buy Indian Act in this instance, and essentially argues that because of the social policy reflected in the act, BIA must set its negotiated procurements aside for Indians under 41 U.S.C. § 252(c)(15) and the Buy Indian Act.

As a matter of law, the Secretary of the Interior, acting through the Commissioner of Indian Affairs, has broad discretionary authority under the Buy Indian Act in the purchase of products of Indian industry. See Department of the Interior--request for advance decision, B-188888, December 12, 1977, 77-2 CPD 454. There is nothing in the law, however, which requires that particular procurements be set aside exclusively for Indians. In this respect, we have held that in view of the degree of discretion conferred by the Buy Indian Act, the policy expressed in the BIA manual does not establish legal rights and responsibilities so that violation of it would be illegal and subject to objection by our Office. Means Construction Company and Davis Construction Company, a joint venture, supra. Therefore, we will not review individual BIA decisions not to limit procurements to Indian firms under the Buy Indian Act unless there is a clear showing that there has been an abuse of the broad discretion conferred by the Act.

Here, while it is debatable whether the services being procured can be considered to be a "product of Indian industry," see also Cecil D. Andrus, Secretary of the Interior v. Glover Construction Company, 100 S. Ct. 1905 (1980), even if we assume that the services may be so categorized, we would have no basis to conclude that there has been an abuse of discretion in light of the record before us. Accordingly, the protest on this issue is dismissed.

Vallie's concerns with the RFP's use of terms generally reserved for formally advertised procurement (such as the word "bid" in places), the solicitation's evaluation criteria, and the amount of time for proposal preparation are untimely. Section 20.2(b)(1) of our Bid Protest Procedures requires that alleged improprieties apparent from the solicitation as issued be filed before the date set for the receipt of initial proposals. Proposals in response to Interior's RFP were due on September 11, 1980, but Vallie's protest on these matters was not filed in our Office until September 12. Accordingly, the merits of the issues will not be considered.

We recognize here that a copy of Vallie's protest to our Office was received at the contracting activity on September 10, the day before proposals were due. However, for a protest directed to our Office to be timely under our Bid Protest Procedures, it must be received in our Office by the required time, and otherwise timely receipt at the contracting activity is irrelevant. 4 C.F.R. § 20.2(b)(3); Ling Electronics, Inc., B-199748, August 6, 1980, 80-2 CPD 96; National Designers, Inc., B-195353, B-195354, August 6, 1979, 79-2 CPD 86.

The remaining issue raised is that proposed prices improperly were read aloud in the offerors' presence, resulting in an auction atmosphere. In this regard, in a negotiated procurement contracting officials are precluded from publicly disclosing an offeror's price or the number or identity of the competitors. Federal Procurement Regulations (FPR) § 1-3.805-1 (1964 ed.). BIA concedes the impropriety, explaining that the contracting officer was inexperienced.

We do not see how Vallie was harmed by the contracting officer's improper action. Upon technical evaluation Vallie's offer was scored the lowest of any of the ten received, and the firm therefore was not included in the competitive range.

The competitive range is comprised of proposals which are judged either acceptable or reasonably susceptible of being made acceptable through negotiations. FPR § 1-3.805-1(c). Since Vallie thus had no chance of being awarded the contract under the circumstances of this procurement, the firm clearly was not prejudiced by the contracting officer's error.

Moreover, the disclosure here would not be reason in itself to invalidate the award under the RFP. While FPR § 3.805-1(b) prohibits auctions, it does not describe any legal consequences which would attach to a resulting award. Although our Office certainly does not sanction the disclosure of information which would compromise a competition, we have stated that we see nothing inherently illegal in the conduct of an auction in a negotiated procurement. See 48 Comp. Gen. 536, 541 (1969). Thus, we did not object to an award where all contending offerors were placed in the same competitive position by the public opening of proposals. See M. Bennett Ltd., B-198316, May 27, 1980, 80-1 CPD 363.

Under the circumstances, the protest on this issue is denied. However, by separate letter we are bringing the matter to the attention of the Secretary of the Interior.

The protest is dismissed in part and denied in part.

Notwithstanding our resolution of the protest, we are concerned with the length of time that it took for Interior to furnish to our Office a report responsive to Vallie's allegations. On September 16, 1980, we requested Interior to submit a report on the protest within 25 working days, in accordance with section 20.3 of our Bid Protest Procedures. That provision reflects both what we consider to be a sufficient period for the preparation of a report, and our view that the expeditious handling of bid protests is indispensable to the protection of protesters and other parties. Wheeler Industries, Inc., B-193883, July 20, 1979, 79-2 CPD 41.

However, a complete report was not submitted until seven months later. Accordingly, we are also bringing this matter to the attention of the Secretary of the Interior. See Alderson Reporting, B-195009, March 5, 1980, 80-1 CPD 172.

Milton J. Socolar

Acting Comptroller General
of the United States