

*P.L. II
Cohen*

DECISION



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

FILE: B-201851

DATE: June 8, 1981

MATTER OF: Northland Anthropological Research, Inc.

DIGEST:

Buy Indian Act, 25 U.S.C. § 47 (1976), permits negotiation of contracts exclusively with Indian firms at discretion of Secretary of Interior. Fact that lower contract price could have been obtained through unrestricted competition does not establish that discretion to limit procurement was abused.

Northland Anthropological Research, Inc. (NAR) protests the award of a contract by the Department of the Interior's Bureau of Indian Affairs (BIA) to Esca-Tech Corporation under solicitation ASC-K01-3310 for professional archaeologist services. The procurement was restricted to Indian-owned firms under the authority of the Buy Indian Act, 25 U.S.C. § 47 (1976). NAR (which is not Indian-owned) contends that BIA knew that the services could have been acquired at a substantially lower cost than Esca-Tech's contract price if the procurement had not been restricted. We find no legal merit to NAR's assertions.

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."

Office of Bureau of Indian Affairs - Contract Award

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The Secretary of the Interior, acting through the Commissioner of Indian Affairs, has broad discretionary purchasing authority under the Buy Indian Act. See Department of the Interior--request for advance decision, B-188888, December 12, 1977, 77-2 CPD 454. Accordingly, absent a showing that such discretion clearly has been abused, we have no basis to object to a preference given pursuant to the statute. Means Construction Company and Davis Construction Company, a joint venture, 56 Comp. Gen. 178 (1976), 76-2 CPD 483; 50 Comp. Gen. 94, 96 (1970).

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, supra; 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 regard 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 instant record shows that at least two Indian firms were invited to bid on BIA's requirement.)

It is inherent in most procurements that are limited to a particular class that awards often will be at higher prices than could be obtained in unrestricted competitions. For example, the Government may pay a reasonable premium price to small business firms in procurements set aside for them in furtherance of the policy inherent in the Small Business Act, 15 U.S.C. § 631 (1976), that a fair proportion of Government contracts be awarded to small businesses. See Canadian Commercial Corporation, B-196111, May 29, 1980, 80-1 CPD 369. Similarly, in view of the socio-economic goal of the program reflected in section 8(a) of the Small Business Act, 15 U.S.C. § 637 (a)(1) (Supp. III 1979)--to help socially and economically disadvantaged small business concerns become self-sufficient--the Small Business Administration properly may, after contracting with a Government agency to fulfill the agency's need, subcontract with a

qualified firm at a price higher than otherwise obtainable. See Leo Journagan Construction Co., Inc., B-197673, February 25, 1980, 80-1 CPD 158.

As already stated, the Buy Indian Act is intended to further Indian participation in Federal programs for Indians. The fact that a contract is awarded to an Indian firm under a procurement restricted to Indian firms under the act at a higher price than could be obtained through an unrestricted competition does not establish that the determination to limit participation to effect the act's goal was an abuse of the broad discretion conferred on the Secretary of the Interior by the statute.

NAR also requests that we investigate the general Buy Indian Act procurement practices of the particular contracting activity involved here. NAR alleges that contract awardees often fail to complete performance or to perform satisfactorily; that non-Indian firms then are hired to finish or redo the work; and that the original contractors nonetheless still receive substantial payments under the defaulted contract. BIA responds that "[i]f a contractor fails to complete his contract, whether he is Indian or non-Indian, we have always taken appropriate action to protect the interest of the U.S. Government."

The type of investigation requested clearly is not appropriate under our bid protest function, which is designed to resolve complaints about the awards or proposed awards of contracts by Federal agencies. See our Bid Protest Procedures, 4 C.F.R. part 20 (1980).

Further, while under our audit function we review a broad spectrum of Federal activities, our resources are limited. Consequently, critical decisions must be made regarding the efficacy of each review in terms of obtaining the greatest benefit for resource utilization. Here, NAR essentially is speculating that the Buy Indian Act socio-economic policy may not be appropriate or at the least it is not being effectively implemented, and that defaulted Indian contractors may be getting overpaid in termination settlements despite BIA's position to the contrary. We do not consider such speculation to warrant

our review of the matter in the audit context in light of the possible benefits vis-a-vis utilization of personnel in other investigations. See Bethlehem Steel Corporation, B-198659, October 21, 1980, 80-2 CPD 305.

The protest is denied.

A handwritten signature in black ink that reads "Milton J. Fowler". The signature is written in a cursive style with a prominent initial "M".

Acting Comptroller General
of the United States