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DECISION

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

FILE: B-202433 DATE: September 9, 1981

MATTER OF: Navajo Food Products, Inc.

DIGEST:

1. Contract matters are exempt from requirement in Administrative Procedure Act that agencies publish various procedural and substantive rules and policies in Federal Register.

2. Buy Indian Act, 25 U.S.C. § 47, permits negotiation of contracts exclusively with Indian firms for Indian products at discretion of Secretary of the Interior. Fact that particular Indian firm received contract to supply dairy products for previous 10 years after Secretary exercised discretion to set those contracts aside for Indians does not give firm property right to subsequent contracts. Since constitutional protection of procedural due process only applies if a right is being taken away, Secretary did not have to afford that firm hearing before deciding not to set 1981 contract aside.

3. Secretary of the Interior's decision not to set contract aside for Indians under Buy Indian Act does not constitute de facto debarment of Indian firm that has received contract for the requirement for previous 10 years, since debarment means exclusion from Government contracting and subcontracting for reasonable, specified period of time.

4. Agency properly could award contract under IFB despite IFB notice that it was "for information purposes," since notice also clearly cautioned firms to submit best bids, and that Government reserved right to make award to low bidder.

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5. Protest that awardee cannot meet contractual obligation is dismissed, since matter involves firm's responsibility, and GAO does not review affirmative determinations of responsibility except in limited circumstances.

Navajo Food Products, Inc. (NFP) protests the award of contracts by the Department of the Interior's Bureau of Indian Affairs (BIA) to Hulet Distributing Company and Meadow Gold Dairies under invitation for bids (IFB) No. NA600-8854. The contracts are to furnish fresh dairy products for BIA's Navajo Area Office (NAO) school food program, which supplies food for 87 schools. The thrust of the protest is that NFP, an Indian-owned firm, should have been awarded a contract for the requirement pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1976).

The protest is denied in part and dismissed in part.

The record shows that NFP had supplied dairy products for the NAO school food program for the 10 years preceding this procurement, under contracts negotiated under the Buy Indian Act. The Act, which reflects Congress' intent to further Indian participation in Federal programs conducted for Indians, provides:

> "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."

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 Department of the Interior's policy in this respect provides for contracting with qualified Indian firms to the maximum extent practicable; non-Indian firms are to 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.

A 1980 Interior review of the NAO program found the program to be inefficient, uneconomical and lacking effective controls. On the basis of that review, and complaints from school officials about the high price and poor quality of the dairy products furnished by NFP, the Commissioner of Indian Affairs formally waived the Buy Indian Act preference for the 1981 procurement and authorized the purchase of the dairy products on the open market. (The Secretary of the Interior has delegated his authority under the Act to the Commissioner of Indian Affairs.)

BIA then issued IFB No. NA600-8854. It included the following statement:

"IMPORTANT NOTICE TO OFFERORS"

"THIS REQUEST IS FOR INFORMATION PURPOSES. HOWEVER, YOU ARE REQUESTED TO SUBMIT YOUR BEST AND FINAL OFFER. THE GOVERNMENT RESERVES THE RIGHT TO MAKE AWARD TO THE LOWEST OFFEROR ON ANY ITEM, SUB-ITEM, GROUP OR ALL ITEMS OR TO AGGREGATE AWARDS, AS DEEMED MOST ADVANTAGEOUS TO THE GOVERNMENT. * * * AWARD OF THIS CONTRACT, IF IT IS DETERMINED TO BE IN THE BEST INTERESTS OF THE GOVERNMENT SHALL BE BASED ON THE LOWEST OFFER TO GOVERNMENT. * * *"

BIA had not advised NFP that the 1981 requirement was going to be competed without the Buy Indian Act preference, and NFP thus assumed that as the only Indian-owned firm in the area, it was going to receive the 1981 contract pursuant to the preference. Therefore, upon receiving the invitation and noting the caution that it was for "information purposes," NFP expected that BIA was going to compare NFP's bid with the others received and through such a market test negotiate a 1981 contract price with NFP. BIA, however, simply awarded two contracts under the invitation to non-Indian firms based on the low bids received.

NFP first protests that BIA has never published in the Federal Register the criteria that it uses to decide whether to waive the Act's preference, which NFP argues violates the Administrative Procedure Act, 5 U.S.C. § 552. That statute

requires agencies to publish various procedural and substantive rules and policies in the Federal Register. NFP further complains that the preference was waived for reasons to which NFP never was given the chance to respond and under standards that never were made known to the public. NFP contends that BIA's 10 years of contracting with NFP essentially gave the firm a property right in the contract for the services which the Government could not take away without first affording NFP the constitutional protection of procedural due process. NFP also suggests that the waiver of the preference under the circumstances constituted an improper de facto debarment. NFP argues that these deficiences--failure to publish standards and waiver without a hearing--not only are improper in themselves, but reflect an abuse of the discretion afforded to the Secretary of the Interior by the Buy Indian Act to decide whether to limit a particular procurement to Indian firms.

NFP also protests that, in any event, it was not appropriate for BIA to award contracts under a solicitation that stated that it was for "information purposes" only.

Finally, NFP contends that Hulet lacks the facilities to properly perform the contract.

(1) Waiver without hearing or published standards

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. While it is general BIA policy to contract with Indian firms whenever possible, that policy is not law, and we have held that in view of the discretion conferred by the Act itself, the policy expressed in the BIA manual does not establish legal rights and responsibilities so that a waiver or violation of it would be illegal and subject to objection by our Office. Means Construction Company and Davis Construction Company, a joint venture, supra.

The protester's argument that BIA's failure to publish regulations to implement the Buy Indian Act violates the Administrative Procedure Act is without merit, as the latter statute exempts contract matters from its rule-making provisions. 5 U.S.C. § 553(a)(2); see Dorman Electric Supply Co., Inc., B-196924, May 20, 1980, 80-1 CPD 347.

Also, we find no legal merit to NFP's constitutional argument. It is well settled that no firm has a property right in a Government contract. See Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940). (Firms do, of course, have the right to have their bids or offers considered fairly. See Decision Sciences Corporation-Claim for Proposal Preparation Costs, 60 Comp. Gen. 36 (1980), 80-2 CPD 298.) NFP received contracts in the past because the Commissioner of Indian Affairs exercised the broad discretion afforded by the Buy Indian Act to invoke the Act's preference. The Congress similarly gave the Commissioner the discretion not to invoke the preference. Under the circumstances, we do not agree that the Commissioner's past actions alter the Perkins rule in this case so as to give NFP a property right in the 1981 contract and thereby limit the broad discretion that the Congress conferred. Thus, since NFP was not deprived of any right, the constitutional protection of procedural due process does not apply here to invalidate the Commissioner of Indian Affairs' waiver of the Buy Indian preference. See Perkins v. Lukens Steel Co., supra; Coyne-Delaney Co., Inc. v. Capital Development Board of the State of Illinois, et al., 616 F.2d 341, 343 (7th Cir. 1980).

Moreover, we do not agree that BIA's actions constituted an improper de facto debarment. Debarment is exclusion from Government contracting and subcontracting for a reasonable, specified period, following notice and a hearing. Federal Procurement Regulations § 1-1.601-1 (1964 ed.). BIA has not excluded NFP from contracting with it or any other Government agency. See Macro Systems, Inc.; Richard Katon & Associates, Inc., B-195990, August 19, 1980, 80-2 CPD 133.

Notwithstanding the above, we share the protester's concern with regard to the lack of Interior regulations implementing the Buy Indian Act. We expressed our concern in McCaleb Associates, Inc.--Reconsideration, B-197209, October 6, 1980, 80-2 CPD 243, a protest against an award by BIA without a Buy Indian preference. In response, Interior informed us by letter

of November 24, 1980, that detailed regulations establishing definite guidelines about the circumstances and the manner in which the Department of the Interior's bureaus and offices may negotiate under the authority of the Buy Indian Act would be published shortly. BIA now informally has advised us that the regulations are expected to be in final draft form in 30-60 days.

(2) Propriety of awards under solicitation

NFP protests that the awards were improper in any event because the IFB's "Important Notice to Offerors" clearly stated that the solicitation was for "information purposes."

That notice was hardly a model of clarity. First, while it described the solicitation as being for "information purposes," it also cautioned "offerors" to submit their best prices, and clearly indicated that the Government might award a contract based on those prices. Second, it referred to "offerors" and "best and final offer," both terms which are used in negotiated rather than formally advertised procurements. Nonetheless, we do not believe it was improper for BIA to make awards under this solicitation. The solicitation itself--with its Standard Form 33 designation of "advertised (IFB)" and its references to bid opening and the bid acceptance period--clearly identified this procurement as a formally advertised procurement, under which awards could reasonably be expected to be made. Thus, the notice, in our view, really only stated what could happen in any advertised situation, i.e., that award ultimately might or might not be made under the solicitation. See generally Federal Procurement Regulations §§ 1-2.404-1, 1-2.407-1 (1964 ed.). Consequently, NFP should have been on notice that BIA might award contracts under the IFB and should have submitted its best price. At best, the language of the notice should have raised doubt in NFP's mind as to BIA's intentions, and it should have contacted BIA to obtain clarification of the solicitation statement.

Accordingly, we see no reason to object to the awards merely because NFP, incorrectly believing that it had a right under the Buy Indian Act to the 1981 contract, expected that BIA would use any responses to negotiate a contract with NFP pursuant to the statute no matter what the firm bid.

(3) Hulet's ability to perform

NFP contends that Hulet will not be able to meet its obligations under the contract because it is a distributor, not a dairy.

The IFB, however, did not specify that offerors must be dairies. In any case, a prospective awardee's ability to perform involves the firm's responsibility, and in making the award to Hulet BIA determined that Hulet was a responsible firm. FPR § 1-1.1203. Our Office does not review affirmative determinations of responsibility unless the protester shows either that contracting officials may have committed fraud or that the solicitation contained definitive responsibility criteria which were not applied. AAA Forestry Services, Inc., B-203175, June 5, 1981, 81-1 CPD 452. Neither exception is involved here. The protest on this issue is dismissed.

The protest is denied in part and dismissed in part.

Milton J. Socolar

Acting Comptroller General
of the United States