

**DECISION**



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

**FILE:** B-210420

**DATE:** May 2, 1983

**MATTER OF:** Educational Services Group (ESG), Management  
Concepts Incorporated

**DIGEST:**

Provision in solicitation issued by Department of Health and Human Services which gives preference to Indian organizations or Indian-owned economic organizations by requiring negotiation and award solely with Indian organizations if one or more are within competitive range is improper, since there is no legal basis for such a preference.

Educational Services Group (ESG), Management Concepts Incorporated, protests an Indian preference provision in solicitation No. 105-83-P-6103 issued by the Department of Health and Human Services (HHS). The provision, included pursuant to HHS regulations at 45 C.F.R. § 1336.60(b) (1982), requires that HHS's Administration for Native Americans give Indian organizations and Indian-owned economic enterprises preference in the award of contracts which are for the benefit of Indians. The solicitation provision further defines the preference as requiring negotiation and award solely with Indian organizations if one or more Indian organizations or Indian-owned economic enterprises are within the competitive range. ESG contends that there is no legal basis for the preference.

**We sustain the protest.**

The cited regulation is part of HHS's implementation of the Native American Programs Act of 1974, 42 U.S.C. § 2991 et seq. (1976), which is designed to promote economic and social self-sufficiency for American Indians, and Hawaiian and Alaskan Natives. HHS contends that section 803(a), 42 U.S.C. § 2991b(a), supports the Indian preference contained in the regulation, although the agency

025445

does not address the propriety of this particular solicitation's definition of how the preference will be accorded.<sup>1</sup> Section 803(a) authorizes the Secretary of HHS to provide financial assistance for the purpose of promoting the goal of economic and social self-sufficiency for American Indians. HHS argues that the Indian preference provision reasonably furthers the Act's general purposes.

We do not agree that section 803(a) supports the preference at 45 C.F.R. § 1336.60(b), and we find nothing else in the Act or its legislative history that otherwise would permit the preference included in this solicitation. Section 803(a) authorizes financial assistance to "public and nonprofit private agencies" such as the governing bodies of Indian tribes on Federal and State reservations, not to Indian-owned economic organizations. Furthermore, section 813 of the Act, 42 U.S.C. § 2992c(1), defines the type of financial assistance contemplated as "assistance advanced by grant, agreement or contract," and specifically excludes "the procurement of plant or equipment, or goods or services."

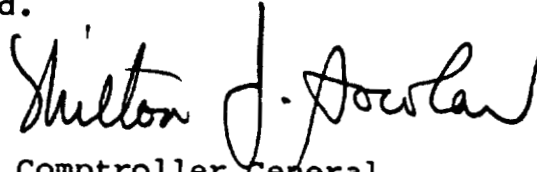
The Federal Procurement Regulations (FPR), which implement the laws governing contracts by the Federal Government, require that negotiated procurements be conducted on a competitive basis to the maximum extent possible, FPR § 1-3.101(d) (1964 ed.), and that discussions be conducted with all offerors in the competitive range. FPR § 1-3.805-1. These FPR provisions, implementing a statute of multi-agency applicability, are mandatory on HHS and, in the absence of statutory authority allowing it to do so, HHS may not issue regulations which are inconsistent with the FPR. See Environmental Growth Chambers, B-201333, October 8, 1981, 81-2 CPD 286. Since there is no statutory basis for the Indian preference set out in 45 C.F.R. § 1336.60(b), the preference violates the FPR requirement for maximum competition, and this solicitation's implementation of the preference also violates the discussions

---

<sup>1</sup> HHS admits that neither the Buy Indian Act, 25 U.S.C. § 47, which permits setting procurements aside for Indians, nor section 7(b) of the Indian Self Determination and Education Assistance Act, 25 U.S.C. § 450e(b), which concerns Indian preferences in subcontracting, applies to this procurement.

requirement. We therefore recommend that HHS's regulations be revised to eliminate the preference, and that the solicitation be amended to provide for discussions with all offerors within the competitive range. By separate letter, we are advising the Secretary of Health and Human Services.

The protest is sustained.

for   
Comptroller General  
of the United States