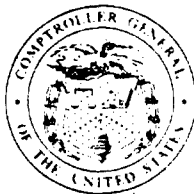


**DECISION****THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

60528

FILE: B-184427

DATE: February 18, 1976

MATTER OF: Boyer, Biskup, Bonge, Noll,  
Scott & Associates, Inc.

98597

**DIGEST:**

Proposed award of school design contract to Indian school board under title I, Public Law 93-638-- "Indian Self-Determination Act"--is not objectionable, provided requirements of act and its regulations are satisfied. Act provides contracting authority covering broad range of Indian programs and independent of contracting laws and regulations ordinarily applicable to Interior Department, including Brooks Bill architect-engineer selection procedure (40 U.S.C. § 541, et seq., and FPR subpart 1-4.10). Therefore, protest by architectural firm competing in Brooks Bill procurement initiated prior to school board's application for contract under Public Law 93-638 is denied.

The Bureau of Indian Affairs (BIA) proposed to cancel a procurement of architect-engineer (A-E) services, and instead award a contract to the Little Wound, South Dakota, School Board under the Buy Indian Act, 25 U.S.C. § 47 (1970). The School Board planned to subcontract the design work for a new school to members of an A-E firm which had been selected as a competitor in the canceled procurement. Another of the selected A-E firms protested, claiming that this action would violate, among other provisions, the prohibition in BIA regulations against brokerage-type arrangements (in which an inexperienced Indian contractor obtains the contract and subcontracts the work to a non-Indian party).

The Interior Department takes the position that an award can be made to the School Board under the authority of the Indian Self-Determination and Education Assistance Act, Public Law 93-638, January 4, 1975, 88 Stat. 2203. The Department states that it considers two resolutions adopted by the School Board on April 1, 1975, as an application for a "tribal contract" under Public Law 93-638 and the implementing regulations issued pursuant to section 107(b)(4) of title I of the statute--the "Indian Self-Determination Act."

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The foregoing are the essential facts involved in the protest of Boyer, Biskup, Bonge, Noll, Scott & Associates, Inc. (Boyer). The question to be resolved is whether title I of Public Law 93-638 provides a suitable and sufficient legal basis for BIA to proceed with the award. For the reasons which follow, we conclude that it does.

Initially, we note that certain congressional findings and declarations of policy underlying the provisions of Public Law 93-638 are set forth in sections 2 and 3 of the statute. Section 2 states that the Congress finds, inter alia, that true self-determination is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles, and that parental and community control of the educational process is of crucial importance to the Indian people. The congressional declaration of policy in section 3 of the statute states that Congress recognizes the United States' obligation to respond to the strong expression of the Indian people for self-determination; that Congress is committed to the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs to effective and meaningful participation by Indian people in planning, conducting and administering programs; and that a major national goal is to provide the quality and quantity of educational services which will permit Indian children to achieve the measure of self-determination essential to their well-being.

Further, section 102(a) of title I, Public Law 93-638, provides as follows:

"The Secretary of the Interior is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to plan, conduct, and administer programs, or portions thereof, provided for in the Act of April 16, 1934 (48 Stat. 596) [25 U.S.C. § 452], as amended by this Act, any other program or portion thereof which the Secretary of the Interior is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208 ) [see 25 U.S.C. § 13], and any Act subsequent thereto: Provided, however, That the Secretary may initially decline to enter

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into any contract requested by an Indian tribe if he finds that: (1) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory; (2) adequate protection of trust resources is not assured, or (3) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract: Provided further, That in arriving at his finding, the Secretary shall consider whether the tribe or tribal organization would be deficient in performance under the contract with respect to (A) equipment, (B) bookkeeping and accounting procedures, (C) substantive knowledge of the program to be contracted for, (D) community support for the contract, (E) adequately trained personnel, or (F) other necessary components of contract performance." (Emphasis added.)

Significantly, the statute directs the Secretary to enter into contracts with tribal organizations for the programs specified, and provides that he may decline to do so only upon finding that one of the stated conditions is present in a given case. In regard to the types of programs which are referenced in this section, we note that 25 U.S.C. § 452 authorizes the Secretary to enter into contracts for, among other purposes, the education of Indians. 25 U.S.C. § 13 provides that BIA, under the direction of the Secretary, shall expend appropriated funds for a number of stated purposes involving the benefit, care, and assistance of Indians, one of which is "General support and civilization, including education." Also, we note that the statute appropriating funds for BIA programs in fiscal year 1975 (Public Law 93-404, August 31, 1974, 88 Stat. 809) makes reference to a number of the general purposes, including education, which are stated in 25 U.S.C. § 13. The appropriations law includes monies for BIA to obtain A-E services by contract. It would appear that a BIA procurement of A-E services for an Indian organization is reasonably to be regarded as one of the types of "programs" within the scope of section 102(a) of Public Law 93-638.

Concerning the application of section 102's contracting authority in relation to other laws, we note that section 106(a) of title I, Public Law 93-638, provides:

"Contracts with tribal organizations pursuant to sections 102 and 103 of this Act shall be in accordance with all Federal contracting laws and regulations except that, in the discretion of the appropriate Secretary,

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such contracts may be negotiated without advertising and need not conform with the provisions of the Act of August 24, 1935 (49 Stat. 793), as amended: Provided, That the appropriate Secretary may waive any provisions of such contracting laws or regulations which he determines are not appropriate for the purposes of the contract involved or inconsistent with the provisions of this Act." (Emphasis added.)

The Commissioner of Indian Affairs, exercising rulemaking authority delegated by the Secretary, has promulgated regulations implementing Public Law 93-638. See 40 Fed. Reg. 51282, 51331 (1975). These amend the BIA regulations in 41 C.F.R. chapter 14H (1975) by adding a new part 14H-70. Section 14H-70.003 of the new regulations provides in pertinent part:

"To the extent that the Federal Procurement Regulations and Interior Procurement Regulations, 41 CFR Chapter 1, Chapter 14, and Chapter 14H (except 41 CFR Part 14H-1) respectively are not made specifically applicable to contracts entered into pursuant to the Act by reference in this Part 14H-70 they are hereby waived. If this part conflicts with any of the provisions of either the Federal Procurement Regulations or Interior Procurement Regulations the provisions of this Part 14H-70 shall govern. \* \* \*"

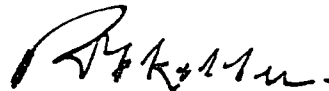
It is reasonably clear from the foregoing that the Indian Self-Determination Act as implemented contemplates the exercise of contracting authority by the Secretary over a broad range of Indian matters, including programs relating to education, and that the procurement procedures under the act are to be without the encumbrances and restrictions imposed on ordinary departmental procurements by virtue of the Federal Procurement Regulations (FPR's) and the Interior Procurement Regulations. The FPR's, which the departmental regulations supplement, are issued under the Federal Property and Administrative Services Act of 1949, as amended (the Property Act), 40 U.S.C. § 471, et seq. (1970). The procedure normally to be followed in contracting for A-E services is prescribed in an amendment to the Property Act known as the Brooks Bill

(Public Law 92-582, October 27, 1972, 86 Stat. 1278, 40 U.S.C. § 541, et seq. (Supp. II, 1972)). The Brooks Bill procedure essentially involves the conduct of discussions with not less than three A-E firms as prospective contractors for a particular project, based on their statements of qualifications on file with the agency, or on those which may be submitted in response to publication of the project; the selection of not less than three of these firms as most highly qualified to provide the services required; and the negotiation of a contract with the highest qualified firm at a fair and reasonable price, or with the other A-E firms in the order of selection until a contract at a fair and reasonable price can be obtained. See FPR subpart 1-4.10 (1964 ed. amend. 150). This was the procedure being followed in the present case until the School Board requested that the contract be awarded to it.

Since the Brooks Bill is an amendment to the Property Act, and since the Indian Self-Determination Act as implemented contemplates the exercise of procurement authority which is independent of and apart from the Property Act requirements as implemented in the FPR's, subject only to the restrictions imposed by Congress in title I itself or applied by the Secretary in regulations issued thereunder, it follows that title I provides a legal basis for award of a contract to the School Board in this case. This conclusion is, of course, subject to the proviso that all requirements imposed by title I and the departmental regulations in part 14H-70, supra, are found to be satisfied in the case of the School Board. We would also note that in view of section 102(a)'s mandatory language, supra, and of the fact that the School Board's resolutions specifically referenced Public Law 93-638, it appears that award of a contract to the School Board is not only authorized but required, unless the Department determines that one or more of the act's requirements are not met in this case.

In view of the foregoing, the questions raised concerning BIA's initial plans to contract with the School Board under the authority of the Buy Indian Act are academic.

The protest is denied.



Deputy Comptroller General  
of the United States