**DECISION**

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

**FILE:** B-210056 **DATE:** May 16, 1983

**MATTER OF:** J & A Inc.

**DIGEST:**

1. Indian Self-Determination and Education Assistance Act does not require the recipient of Department of Housing and Urban Development (HUD) assistance funds to select an Indian-owned firm for a contract for the benefit of Indians where the agency reasonably decides the firm does not have the experience to perform as required, because the statute, as well as HUD's implementing grant regulations, call for preference "to the greatest extent feasible," which confers broad discretionary authority with respect to selection decisions.

2. GAO will not review the Department of Housing and Urban Development's implementation of the Indian preference in the Indian Self-Determination and Education Assistance Act in that agency's various assistance programs nationwide, since the same matter is before a court of competent jurisdiction.

3. GAO will not consider hypothetical questions about various agencies' implementations of the Indian preference in the Indian Self-Determination and Education Assistance Act in response to request by Indian firm that was not awarded a contract by an Indian Housing Authority.

J & A Inc. complains about the rejection of its proposal to furnish architectural and engineering services to the North Pacific Rim Housing Authority in Alaska in connection with a housing project for the Village of Chenega. The project will be funded by the Department of Housing and Urban Development (HUD). J & A, an Indian-owned firm, asserts its proposal should have been

accepted pursuant to the Indian preference provisions of section 7(b) of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450e(b) (1976). Section 7(b) establishes a preference for Indian-owned firms, "to the greatest extent feasible," in the award of subcontracts and subgrants under contracts with or grants to Indian organizations or for the benefit of Indians. HUD's regulations implementing section 7(b) also require Indian housing authorities to give preference, "to the greatest extent feasible," to Indian-owned enterprises in the award of contract and subcontracts. 24 C.F.R. § 805.106(a) (1982). J & A also complains about HUD's enforcement of the preference in general, and poses a number of hypothetical protests involving implementation of the section 7(b) preference by various Federal agencies.

We deny the complaint against the rejection of J & A's proposal, and we dismiss the remainder of the complaint.

We first point out that we review procurements under HUD assistance agreements of this sort pursuant to our Public Notice entitled "Review of Complaints Concerning Contracts Under Federal Grants," 40 Fed. Reg. 42406 (1975). Curtiss Development Co. and Shipco, Inc., 61 Comp. Gen. 85 (1981), 81-2 CPD 414. The purpose of our review is to insure that recipients of Federal assistance comply with all requirements imposed upon them by the terms of the assistance agreement and Federal law or regulation when contracting for goods and services. International Business Machines Corp., B-194365, July 7, 1980, 80-2 CPD 12.

The Housing Authority advertised the procurement of the architectural and engineering services in a mid-October 1982 public notice that expressly encouraged Indian and Alaskan Native-owned firms to participate. The notice required that interested parties submit Standard Form 255, an A-E and related services questionnaire, by October 22.

According to HUD, the Housing Authority considered the proposal submitted by J & A, the only Indian-owned firm that responded by the deadline, in light of the 7(b) preference for Indian-owned firms. The Housing Authority

proceeded to contact officials at certain HUD projects that J & A listed in the related-experience section of the firm's response to the public notice of the procurement, as well as an official in the architect-engineer section of HUD itself, but was unable to confirm J & A's participation in the projects. The Housing Authority, on November 9, therefore delivered to J & A a written request for the names of individuals at the housing authorities J & A listed who could be contacted as references, and for a detailed description of J & A's involvement in the projects and other similar ones completed in Alaska, as well as documentation of the firm's tribal enrollment. J & A was required to respond by 4:00 p.m. the next day. The firm, however, did not respond with the requested experience-related information by the time prescribed. Instead, J & A advised the Housing Authority that it could not locate the appropriate contacts at the projects, and that it believed the Housing Authority's request for detailed information within a short time period was a "hardship."

The selection of another firm was made on or about November 12. According to the selection memorandum of that date, J & A was not selected because the firm could not perform in the time required and with the necessary expertise. The memorandum states:

> "Because of the failure of * * * J & A, Inc., to submit documentation clarifying areas of doubt as to the firm's prior experience in HUD single-family 'conventional' construction to be considered under Indian preference, it was felt it would not be in the best interests of the Village of Chenega and the Housing Authority to enter into a contract with J & A, Inc. at this time."

J & A suggests that the apparent requirement in the selection memorandum for experience in HUD single-family "conventional" construction is unduly restrictive because there allegedly are few Indian-owned firms that meet it. J & A states that it does have such experience, however, but complains that it could not respond to the November 9 letter by the next day because it had other business to

transact during that time and because its references were not available when the firm attempted to contact them.

We have stated that section 7(b)'s preferential language "to the greatest extent feasible" confers broad discretionary authority on a Federal agency and does not require award to Indian-owned firms. We therefore will not disturb an agency determination made pursuant to the preference in section 7(b) unless the determination is shown to be arbitrary or unreasonable, or to violate law or regulation. See Department of the Interior-request for advance decision, 58 Comp. Gen. 160, 167 (1978), 78-2 CPD 432. The requirement in HUD's regulation that Indian housing authorities give preference "to the greatest extent feasible" to Indian-owned firms in contract and subcontract awards confers no less discretion on the Indian housing authorities in selecting the contractor than section 7(b) confers on HUD itself. Cf. Department of the Interior-request for advance decision, supra (where we state that a prime contractor's implementation of the 7(b) preference is subject to the same standard of review as the agency is in approving or disapproving subcontract awards by the prime).

We see no basis, under that standard, to object to the Housing Authority's decision not to select J & A. The record shows that the Housing Authority, aware of its section 7(b) responsibility, at first intended to negotiate with J & A instead of any non-Indian firms that responded to the public notice. The Housing Authority, however, initially was unable to confirm that J & A was experienced as the firm alleged, and was unable to secure the needed documentation from J & A at least in part because J & A was too busy to prepare it. We note here that the November 12 selection memorandum states that even by that date J & A had not furnished the information requested on November 9. We find nothing unreasonable in the Housing Authority then deciding that, on the basis of the information before it, J & A would not be an acceptable contractor; as stated above, the section 7(b) preference does not mandate award to an Indian firm.

In this respect, J & A provides no reason to conclude that the Housing Authority's view that experience in HUD

single-family construction is needed is unreasonable, except to argue that the requirement excludes a number of Indian-owned firms, other than J & A itself, from competing for the contract. It is well established that a requirement is not improper merely because it restricts competition; rather, the party objecting to it must prove that the requirement does not reflect the legitimate needs of the contracting authority. See Illinois Bell Telephone Company, 61 Comp. Gen. 35, 39 (1981), 81-2 CPD 320.

The complaint against the contract award to another firm is denied.

J & A also requests that we review HUD's enforcement of section 7(b) in the agency's various assistance programs nationwide, and poses a number of questions concerning various agencies' implementations of the section 7(b) preference in hypothetical situations. We will not respond to either request.

HUD's implementation of the 7(b) preference in general is the subject of a suit in United States District Court for the District of Columbia (Civil Action 82-3224). It is our policy not to review matters where the material issues involved also are before a court of competent jurisdiction unless the court expects, requests or otherwise expresses interest in receiving our views. Alfred Calcagni & Son, Inc., B-205029, February 22, 1982, 82-1 CPD 154. In this respect, the fact that J & A is not a party to the litigation is irrelevant, since even the firm concedes that the same issue is involved in both the suit and the complaint to our Office. See A & J Produce, Inc.; D & D Poultry, B-203201.2, B-203201.3, January 25, 1982, 82-1 CPD 52.

Moreover, our role in reviewing complaints about contract awards by recipients of Federal assistance does not include consideration of hypothetical questions. Rather, we review such complaints because we believe it is useful to "audit by exception" using specific complaints as vehicles through which to review the contracting practices and procedures followed and compliance with the requirements in assistance instruments. See Sanders Company Plumbing and Heating, 59 Comp. Gen. 243 (1980), 80-1 CPD 99; Hispano American Corporation--Reconsideration, B-200268.2, July 1, 1981, 81-2 CPD 1. Since there are no specific, substantive procurements involved, we will not consider the matters raised.

The complaint is denied in part and dismissed in part.

for Milton J. Socolar
Comptroller General
of the United States