Comptroller General
of the United States

Washington, D.C. 20548

835293

Decision

Matter of: Indian Resources International, Inc.

File: B-256671

Date: July 18, 1994 94-2 CPD ¶ 29

Terry Wellman for the protester.
Pamela J. Mazza, Esq., Piliero, Mazza & Pargament, for Big Bear Oil Company, Inc., an interested party.
Nora A. Huey, Esq., General Services Administration, for the agency.
Robert Arsenoff, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Services Administration acted properly in not including preferences for Indian-owned firms in mandatory schedule contract solicitation to acquire propane, even where activities of the Bureau of Indian Affairs and the Indian Health Service are among the using activities.

DECISION

Indian Resources International, Inc. (IRI) protests the terms of invitation for bids (IFB) No. TFTC-93-NS-683D, issued by the General Services Administration (GSA) for propane gas required by various agency ordering activities nationwide. The protester contends that the solicitation fails to implement statutory and regulatory preferences for Indian-owned firms.

We deny the protest.

The IFB contemplates the award of fixed-price requirements contracts for propane to be requisitioned by 513 government ordering activities, each of which is represented by a separate line item. The procurement is conducted under the Federal Supply Schedule (FSS) program administered by GSA and is to result in a single-award schedule covering contracts made with single suppliers for delivery to defined geographic areas. Federal Acquisition Regulation (FAR) § 8.403-1. The schedule is the mandatory source of supply for participating ordering activities. FAR §§ 8.001(a)(1)(vi) and 8.404-1.

Prior to the issuance of the IFB, GSA conducted a nationwide requirements survey by requesting government activities to submit their estimated requirements for propane and any special contracting needs. Activities were explicitly advised that submission of requirements would constitute an agreement to be a mandatory user of the resultant FSS contracts.[1] Of the 513 survey forms returned for participation in the FSS program, 78 represented requirements from ordering activities within the Bureau of Indian Affairs (BIA--Department of the Interior) and the Indian Health Service (IHS) (IHS is part of the Public Health Service (PHS) within the Department of Health and Human Services (HHS)); 163 represented requirements from ordering activities within the Department of Defense (DOD).

IRI filed this protest prior to the date set for bid opening. The protester's essential contention is that the line items representing BIA and IHS requirements should have been subject to statutory preferences established by the Buy Indian Act, 25 U.S.C. § 47 (1988), and the Indian Self-Determination Act, as amended, 25 U.S.C. §§ 450 et seq. (1988 and Supp. IV 1992).

In response, the agency argues that the cited statutes apply only to the Secretary of the Interior and the Secretary of Health and Human Services, and do not confer authority on GSA to conduct noncompetitive procurements on behalf of Indian-owned firms. GSA states that, absent such authority, it is required to conduct its procurements seeking full and open competition. 41 U.S.C. §§ 253(a)(1)(A) and 253(c)(5) (1988). GSA also notes that, in responding to the requirements survey and electing mandatory participation in the FSS program, BIA and IHS ordering activities exercised the discretion committed by statute to the Departments of the Interior and HHS not to invoke special authority for Indian-owned set-asides.

By its express terms, the Buy Indian Act states that "[s]o 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 in the discretion of the Secretary of the Interior."[2] 25 U.S.C. § 47. We,

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[1]Activities were free not to participate in the schedule program and to contract independently for their requirements.

[2]When certain Indian health-related functions were transferred from Interior to HHS, this authority was delegated exclusively to the IHS. Department of Health and Human Servs.--Request for Advance Decision, B-232364, Oct. 5, 1988, 88-2 CPD ¶ 325.

therefore, are unable to conclude, absent some explicit delegation to GSA--which is not here present--that GSA could have set aside any of the FSS schedule requirements pursuant to the Buy Indian Act.

Moreover, to the extent that any delegation from BIA or IHS ordering activities exists, it appears that the activities responding to the requirements survey elected not to have their propane requirements subject to set-asides for Indian-owned firms.[3] IRI objects to these decisions by citing a proposed rule of the Department of the Interior[4] and an "Interim Memorandum of the 'Buy Indian' Policy," circulated within IHS on November 26, 1993, as requiring BIA and IHS contracting officers to specifically determine that no Indian firms are eligible for award before filling their requirements without regard to Indian preferences, including the use of FSS schedule contracts.

Although the Buy Indian Act and the Indian Self-Determination Act establish Indian preferences and confer broad discretionary authority to negotiate exclusively with Indian contractors, neither statute requires particular procurements to be set aside for Indian firms. Pine Ridge Constr. Co., B-221501, Jan. 22, 1986, 86-1 CPD ¶ 71. Here, even if we were to conclude that the proposed rule and the internal policy memorandum relied upon by the protester somehow apply, we regard the provisions of such policy statements or proposed rules as matters which do not establish legal rights and responsibilities such as to make actions taken contrary to those statements illegal and subject to objection by this Office. Means Constr. Co. and Davis Constr. Co., a joint venture, 56 Comp. Gen. 178 (1976), 76-2 CPD ¶ 483. Given the broad discretion conferred by statute in the Departments of the Interior and HHS to determine whether to set aside a particular requirement for Indian contractors, we find no basis to object to those agencies' decisions not to set aside these propane requirements. See Pine Ridge Constr. Co., supra.

IRI also objects to GSA's failure to include the clause set forth in FAR § 52.226-1, which requires prime contractors to use best efforts to obtain subcontracts with Indian-owned

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[3]In 1992, GSA advised IRI to discuss its concerns directly with BIA but from the record it does not appear that the protester has done so.

[4]See 56 Fed. Reg. 46468 (1991) (proposed Sept. 12, 1991). We are advised by BIA that, other than internal instructions, no regulations implementing the Buy Indian Act are currently in force.

firms. While FAR § 26.104(a) requires "[c]contracting officers in [DOD]" to include the clause in certain circumstances, "[c]ontracting officers in civilian agencies [e.g., GSA] may insert the clause" if, (1) "[i]n the opinion of the contracting officer," subcontracting possibilities exist for Indian organizations or Indian-owned economic enterprises; and (2) funds are available to cover increased costs of subcontracting with Indian-owned firms. FAR §§ 26.104(b) and 52.226-1(c)(2).

GSA reports that it was aware of only two potential Indian-owned suppliers of propane: IRI and another firm. Upon consultation with the agency small business representative, the contracting officer concluded that IRI was potentially ineligible, as it may not qualify as a regular dealer in propane under the Walsh-Healey Act, and found that the other firm was nonresponsible. GSA also reports that, since the funds of more than 500 separate activities are involved, it was impossible for the contracting officer to conclude, as required by FAR § 26.104(b), that ordering agencies would have funds available to cover the increased costs of subcontracting with Indian-owned firms.

While IRI questions the agency's conclusions regarding its regular dealer status, other than to argue that GSA should have made itself aware of the budgets of the 513 ordering activities, the protester offers no substantive rebuttal to GSA's determination that it was unable to conclude that sufficient funds would be available in any given case under the schedule contract to ensure that preferences could be given to Indian-owned subcontractors. We view this generalized disagreement as insufficient grounds for this Office to conclude that GSA abused its discretion, as conferred by the FAR, in deciding not to include the Indian subcontracting incentive clause in the IFB.

The protest is denied.

/s/ James A. Spangenberg
for Robert P. Murphy
Acting General Counsel