



INTERIOR BOARD OF INDIAN APPEALS

United Sioux Tribes Development Corporation v. Aberdeen Area Director,
Bureau of Indian Affairs

17 IBIA 286 (09/14/1989)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

UNITED SIOUX TRIBES DEVELOPMENT CORP.

v.

ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-23-A

Decided September 14, 1989

Appeal from a decision of the Aberdeen Area Director, Bureau of Indian Affairs, declining to cancel a contract awarded to Trail Blazer Services for preparation of appraisals for the Aberdeen Area.

Dismissed.

1. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals--Contracts: Formation and Validity: Bid Award--Indians: Contracts: Formation and Validity: Bids and Awards

The appeal procedures in 25 CFR Part 2 do not apply to the protest of an award of a Federal procurement contract by a Bureau of Indian Affairs contracting officer, because procedures for such protests are set out in the Federal Acquisition Regulations, 48 CFR Parts 33.1 and 1433.1. The Board of Indian Appeals lacks jurisdiction over such protests.

APPEARANCES: Keith A. Tidball, Esq., Pierre, South Dakota, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant United Sioux Tribes Development Corporation challenges a December 14, 1988, decision of the Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to cancel Contract No. A00C14202997, RFP No. A00-634, which had been awarded to Trail Blazer Services (TBS). For the reasons discussed below, the Board dismisses this appeal for lack of jurisdiction.

Background

On May 9, 1988, the Contracting Officer, Aberdeen Area Office, BIA (contracting officer), issued bid solicitation No. RFP A00-634 for a contract to prepare appraisal reports for the Aberdeen Area for FY 1989. The bid opening was scheduled for July 6, 1988, at 10:30 a.m. Under authority

of the Buy Indian Act, 25 U.S.C. § 47 (1982), the solicitation was limited to Indian and Alaska Native economic enterprises.

Bids were submitted by appellant and TBS. The bids were evaluated by a panel consisting of two BIA review appraisers and two U.S. Fish and Wildlife Service employees. The panel reviewed the written proposals and interviewed both bidders. It found that TBS was the low bidder and that it scored the higher number of points in the panel's evaluation system. It therefore recommended that TBS be awarded the contract.

The contract was awarded to TBS on September 2, 1988. The bidders were notified of the award by memorandum of the contracting officer dated September 23, 1988. By letter dated September 29, 1988, 1/ appellant informed the contracting officer that it intended to appeal the award and asked for information on the appeal procedure. The contracting officer responded by letter of September 28, stating that the relevant procedure appeared at Part 33, "Protests, Disputes, and Appeals," of the Federal Acquisition Regulations (FAR). The contracting officer advised appellant that its appeal should be submitted to him and should specifically identify the basis for the appeal. By letter of October 4, 1989, the contracting officer notified TBS that a formal protest had been lodged and that no notice to proceed with its contract would be issued until the protest was resolved.

Appellant filed a notice of appeal dated October 12, 1988, with the contracting officer. Appellant stated that it was appealing pursuant to 25 CFR Part 2. It requested copies of all bid documents and other supporting documents.

On November 10, 1988, the contracting officer denied the appeal, stating that his decision could be appealed to the Interior Board of Contract Appeals or to the U.S. Claims Court. Also on November 10, the contracting officer notified TBS that it could proceed with work under the contract.

On November 11, 1988, appellant appealed to the Area Director, alleging (1) there was no such entity as Trail Blazer Services, (2) TBS's chief appraiser had not been able to perform his appraisal duties in the past, and (3) over 90 percent of the employees claimed by TBS were really employees of appellant. Appellant requested that the contract be denied to TBS and awarded to appellant.

The Area Director denied the appeal on December 14, 1988, and informed appellant that it could appeal the decision to the Commissioner of Indian Affairs pursuant to 25 CFR Part 2.

By letter dated February 13, 1989, appellant appealed to the Board of Indian Appeals, which referred the appeal to the Washington, D.C., office of BIA pursuant to the appeal paragraph of the Area Director's decision.

1/ This letter is apparently misdated. It was received in the Area Office on Sept. 27, 1988.

On March 27, 1989, after new appeal regulations for BIA and the Board took effect, 2/ the appeal was referred back to the Board.

The appeal was docketed on May 1, 1989, following receipt of the administrative record. No briefs were filed.

Discussion and Conclusions

In United Sioux Tribes Development Corp. v. Contracting Officer, Phoenix Area Office, 17 IBIA 92 (1989), the Board dismissed an appeal similar to this one. In that case, this same appellant had invoked 25 CFR Part 2 in an attempt to appeal the award of a contract to another contractor, after it had been advised that the proper procedure was to file a protest of the award pursuant to the procedures in the FAR. The Board dismissed the appeal for lack of jurisdiction.

In this case, the Area Director advised appellant that it could appeal his decision under 25 CFR Part 2. For this reason, the Board did not dismiss the appeal summarily but requested that the parties address the question of the Board's jurisdiction over the appeal when they filed their briefs. As noted above, however, no briefs have been filed.

It is apparent that this matter should have been handled as a protest under the FAR. 3/ Although the contracting officer initially advised appellant that it should follow the FAR procedures, the process appears to have broken down after appellant filed a document it identified as an appeal under 25 CFR Part 2. 4/ In essence, however, the contracting officer's November 10 decision was equivalent to a decision on a protest. A contracting officer's decision on a protest would normally be the final decision for the Department of the Interior. Accordingly, appellant essentially has received the Departmental review to which it was entitled under the FAR procedures.

[1] Because another procedure for protests is provided in the FAR, the appeal provisions in 25 CFR Part 2 do not apply to this matter. 5/ The FAR procedures do not provide for review of BIA decisions by the Board. The

2/ See 54 FR 6478 and 6483 (Feb. 10, 1989).

3/ See 48 CFR Part 33.1 and the corresponding Interior Department regulations at 48 CFR Part 1433.1. Under these regulations, a protest may be submitted to the agency, to the General Accounting Office, or in cases concerning automatic data processing contracts, to the General Services Board of Contract Appeals.

4/ It appears from the contracting officer's Oct. 4 and Nov. 10, 1988, letters to TBS that he was treating appellant's filing as a protest even though he did not so state in his Nov. 10 decision letter to appellant.

5/ This is made explicit in the present version of 25 CFR 2.3(b): "This part does not apply if any other regulation or Federal statute provide's a different administrative appeal procedure applicable to a specific type of decision."

Board may exercise only such jurisdiction as is vested in it by regulation. See 43 CFR Part 4, Subpart D. Accordingly, the Board lacks jurisdiction over this appeal.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the December 14, 1988, decision of the Aberdeen Area Director is dismissed for lack of jurisdiction.

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge