The Competition in Contracting Act (CICA) and Indian Preference Statutes and Preferences

August 5, 2011

I. Background

Issue: Does Section 2602(d) of the Energy Policy Act of 2005 (Pub. L. 109-58) (EPAct) Indian preference program have the necessary language to permit the use of noncompetitive procedures because EPAct provides for procurement procedures "otherwise expressly authorized by statute"?

- Short answer: Yes. The plain language and legislative history of CICA shows that Congress contemplated Indian preference statutes when exempting agencies from full and open competition requirements.

II. Relevant Statutory Authorities and Case Law

- Under the Competition in Contracting Act (CICA), 41 U.S.C. §§ 3101 et seq., there are exceptions to the requirements of full and open competition.
    - 41 U.S.C. § 3301(a) of CICA, formerly 41 U.S.C. § 253(a)(1)), does not require full and open competition for the procurement of goods and services by an executive agency when "procurement procedures [are] otherwise expressly authorized by statute."[1] According to the U.S. Supreme Court, this exception applies to purchases of goods and services, but not to road construction and repair contracts.[2]

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[1] 41 U.S.C. § 3301 (emphasis added) states:

> (a) In general. Except as provided in sections 3303, 3304(a), and 3305 of this title [*41 U.S.C. §§ 3303*, *3304(a)*, and *3305*] and *except in the case of procurement procedures otherwise expressly authorized by statute*, an executive agency in conducting a procurement for property or services shall--
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> (1) obtain full and open competition through the use of competitive procedures in accordance with the requirements of this division [*41 U.S.C. §§ 3101* et seq.] and the Federal Acquisition Regulation, and; (2) use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

[2] *See Andrus v. Glover,* 446 U.S. 608 (1980) (holding that 41 U.S.C. § 3106(2) (formerly 41 U.S.C. § 252(c)(1)(B)) specifically prohibited set-asides for road construction and repair contracts under the authority of the Buy Indian Act because 41 U.S.C. § 3301 et seq. "does not (1) authorize the erection, repair, or furnishing of a public building or public improvement; or (2) permit a contract for the construction or repair of a building, road, sidewalk, sewer, main, or similar item using procedures other than sealed-bid procedures under section 3301(b)(1)(A) of this

- Under § 3304(a)(5) of CICA (formerly § 253(c)(5)), "an executive agency may use procedures other than competitive procedures only when . . . subject to section 3105 of this title [*41 U.S.C. § 3105*][3], *a statute expressly authorizes or requires that the procurement be made through another executive agency or from a specified source*, or the agency's need is for a brand-name commercial item for authorized resale.

- Section 2602(d)(1) of EPAct (codified at 25 U.S.C. § 3502(d)(1)) authorizes a Federal agency or department to provide preference to qualified Indian owned organizations, corporations, etc. for the purchase of electricity or any other energy product or byproduct. Specifically, section 2602(d)(1) states:

> (d) Preference. (1) In purchasing electricity or any other energy product or byproduct, a Federal agency or department may give preference to an energy and resource production enterprise, partnership, consortium, corporation, or other type of business organization the majority of the interest in which is owned and controlled by 1 or more Indian tribes.

- The Buy Indian Act, 25 U.S.C. § 47, provides also provides authority to purchase products from Indian tribes, but uses different language than EPAct § 2602(d)(1). The Act states, in part: "[s]o far as may be practicable . . . *purchases of the products* (including, but not limited to printing, notwithstanding any other law) of Indian industry *may be made in open market* in the discretion of the Secretary of the Interior" (emphasis added).

- In *Department of Health and Human Services-Request for Advance Decision*, B-232364, Oct. 5, 1988, 88-2 CPD ¶ 325, GAO provided that CICA does not prohibit sole-source awards to Indian enterprises under the Buy Indian Act by stating the following:

> The HHS contracting officer questions whether, because CICA provides a broad mandate for obtaining full and open competition, the instant purchase which is being made pursuant to the Buy Indian Act is subject to the general requirement for competition, and whether the determination to set aside this procurement for exclusive Indian participation is also subject to the F.A.R. "rule-of-two" applicable to small business set asides.
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> *We find that CICA does not subject purchases made pursuant to Buy Indian Act procedures to the general requirement for competition, because CICA contains an exception which encompasses the Buy Indian Act. CICA requires that executive agencies obtain full and open competition, "except as provided [herein] and except in the case of procurement procedures*

[3] 41 U.S.C. § 3105 pertains to simplified acquisition procedures for small purchases.

> *otherwise expressly authorized*." 41 U.S.C. § [3301(a)(1)]. Accordingly, since we have recognized that the Buy Indian Act establishes a procurement procedure which exempts Indian set-asides from the requirements for competition, we believe that it remains so excepted under CICA, in accordance with the above-quoted language.
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> Further, there is no requirement that prior to setting aside such procurements there be a determination by the contracting officer that there is a reasonable expectation that offers will be obtained from at least two responsible qualifying firms, the so-called "rule-of-two," at F.A.R. § 19.502-2 (FAC-84-37), which is applicable to total small business set-asides. Accordingly, the proposed sole-source award to a qualified Indian firm is within the discretion afforded to the Secretary of the Interior under the Buy Indian Act.

Id. at 2-3 (emphasis added).

III. FAR 6.302-5 Exception to Full and Open Competition and EPAct § 2602(d)(1)

FAR 6.302-5 implements CICA's exception to full and open competition under 41 U.S.C. § 3304(a)(5) (formerly § 253(c)(5)) when procurement procedures are expressly required or authorized by statute. FAR 6.302-5 states that full and open competition need not be provided for when a statute expressly authorizes or requires that the acquisition be made through another agency or from a specified source.

An application of FAR 6.302-5 to the preference in § 2602(d)(1) of EPAct indicates that such a preference is exempt from full and open competition requirements. EPAct § 2602(d)(1) contemplates an "acquisition" where it provides, "In *purchasing* electricity or any other energy product or byproduct…." (Emphasis added). In addition, EPAct § 2602(d)(1) authorizes (but does not require) the acquisition be made from an enumerated specified source. EPAct's authorization is found where it states, "In purchasing electricity . . . a Federal agency or department *may* give preference…."[4] (Emphasis added). The use of the word "may" provides

[4] The legislative history of 41 U.S.C. § 253(c)(5) shows that Congress intended to include Indian preference statutes within the exemption. As stated in a 1984 Senate Committee Report:

> S. 338 [CICA] provides six exceptions to competitive procedures which parallel the conditions under which the Comptroller General has historically permitted agencies to award on a sole-source basis . . . [t]he fifth exception states that noncompetitive procedures are permitted when a statute provides that noncompetitive procedures are permitted when a statute provides that the procurement may be obtained through a specified source . . . awards made by agencies under the Small Business Innovation Act (P.L. 97-279) would be [an] example of an appropriate use of this exception. Contracts for the construction or improvement of Indian Reservation Roads, awarded pursuant to the Buy

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authority to DOE to provide a preference, but does not require that DOE provide a preference.[5] Lastly, EPAct § 2602(d)(1) provides that the acquisition be from an enumerated specified source, defining that specified source as "energy and resource production enterprise, partnership, consortium, corporation, or other type of business organization the majority of the interest in which is owned and controlled by 1 or more Indian tribes." Such organizations identified in § 2602(d)(1) are not single sources, rather, they are a specified source. Similarly, other statutes that authorize or require purchase from a specified source that are enumerated in FAR 6.302-5 also apply to specified sources that are a set or group. For example, awards under the 8(a) Program (15 U.S.C. § 637), under the HUBZone Act of 1997, 15 U.S.C. § 657a, and awards under the Veterans Benefits Act of 2003 (15 U.S.C. § 657f) are included in the specified sources listed in FAR 6.302-5(b)(1)-(6). Such sources are not identified as individual firms, but are an identified group.

IV. Summary

By utilizing CICA and FAR exceptions to full and open competition under 41 U.S.C. §§ 3301(a); 3304(a)(5) and FAR 6.302-5, considering relevant legislative history and reflecting on guidance from GAO that pertains to Indian preference programs (e.g., the Buy Indian Act),[6] there is a basis to conclude that DOE may utilize the preference authority of § 2602(d)(1) of EPAct and limit competition to the enumerate list of specified sources.[7]

Application of the preference in § 2602(d) could be accomplished by providing a reasonable opportunity for any entity in the statutory defined list to participate in the process by publicizing the solicitation and synopsis in FedBizOpps. The synopsis should state that the acquisition is

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> Indian Act (25 U.S.C. 47), *as well as other Indian Preference Statutes would be included under this exception.*

S. REP. 98-50 at 2194-95 (Nov. 11, 1983) (Emphasis added).

[5] There are also limitations on the use of FAR 6.302-5 that are only applicable where the underlying statute "requires" the award preference. Here, § 2602(d)(1)'s language that "a Federal agency or department *may* give preference" shows that the statute does not require such preference. Thus, because EPAct § 2602(d)(1) only authorizes, but does not require, the award preference, the other FAR 6.302-5 limitations do not apply.

[6] Here, the language of the Buy Indian Act is not similar to the Indian preference under EPAct. Thus, a high-level consideration of the GAO's examination of the Buy Indian Act may be useful, but a strict application of the GAO's guidance on the Buy Indian Act may not be appropriate.

[7] Use of FAR 6.302-5 would require a Justification for Other Than Full and Open Competition (JOFOC), because a JOFOC is required where the underlying statute (§ 2602(d)(1) of EPAct) "authorizes" but does not require that the procurement be made from a specified source. FAR 6302-5(c)(2)(ii). This also similar to what is contemplated under the Buy Indian Act implementing regulations that provide at 48 C.F.R. § 370.504(a):

> 370.504 Competition. (a) Contracts awarded under the Buy Indian Act are subject to competition among Indians or Indian concerns to the maximum extent practicable. When the Contracting Officer determines that competition is not practicable, a JOFOC is required in accordance with 306.303.

restricted to those sources identified in § 2602(d)(1) of EPAct (e.g., energy and resource production enterprise, partnership, consortium, corporation, or other type of business organization, the majority of the interest in which is owned and controlled by one or more Indian tribes). *See, e.g.*, 48 C.F.R. § 370.504.[8]

[8] This also similar to what is contemplated under the Buy Indian Act implementing regulations that provide at 48 C.F.R. § 370.504(b):

> (b) The Contracting Officer shall: synopsize and publicize solicitations in FedBizOpps and provide copies of the synopses to the Tribal office of the Indian Tribal government directly concerned with the proposed acquisition as well as to Indian concerns and others having a legitimate interest. The synopses shall state that the acquisitions are restricted to Indian firms under the Buy Indian Act.

FAR 6.302-5, Authorized or required by statute, states the following:

> (a) Authority. (1) Citations: 10 U.S.C. 2304(c)(5) or 41 U.S.C. 253(c)(5).
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> (2) Full and open competition need not be provided for when (i) a statute expressly authorizes or requires that the acquisition be made through another agency or from a specified source, or (ii) the agency's need is for a brand name commercial item for authorized resale.
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> (b) **Application.** This authority may be used when statutes, such as the following, expressly authorize or require that acquisition be made from a specified source or through another agency:
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> (1) Federal Prison Industries (UNICOR) -- 18 U.S.C. 4124 (see subpart 8.6);
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> (2) Qualified Nonprofit Agencies for the Blind or other Severely Disabled -- 41 U.S.C. 46-48c (see subpart 8.7);
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> (3) Government Printing and Binding -- 44 U.S.C. 501-504, 1121 (see subpart 8.8);
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> (4) Sole source awards under the 8(a) Program (15 U.S.C. 637), but see 6.303 for requirements for justification and approval of sole-source 8(a) awards over $ 20 million. (See subpart 19.8.)
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> (5) Sole source awards under the HUBZone Act of 1997 -- 15 U.S.C. 657a (see 19.1306).
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> (6) Sole source awards under the Veterans Benefits Act of 2003 (15 U.S.C. 657f).
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> (c) Limitations. (1) This authority shall not be used when a provision of law requires an agency to award a new contract to a specified non-Federal Government entity unless the provision of law specifically --
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> (i) Identifies the entity involved;

(ii) Refers to 10 U.S.C. 2304(j) for armed services acquisitions or section 303(h) of the Federal Property and Administrative Services Act of 1949 for civilian agency acquisitions; and

(iii) States that award to that entity shall be made in contravention of the merit-based selection procedures in 10 U.S.C. 2304(j) or section 303(h) of the Federal Property and Administrative Services Act, as appropriate. However, this limitation does not apply --

(A) When the work provided for in the contract is a continuation of the work performed by the specified entity under a preceding contract; or

(B) To any contract requiring the National Academy of Sciences to investigate, examine, or experiment upon any subject of science or art of significance to an executive agency and to report on those matters to the Congress or any agency of the Federal Government.

(2) Contracts awarded using this authority shall be supported by the written justifications and approvals described in 6.303 and 6.304, except for--

(i) Contracts awarded under (a)(2)(ii) or (b)(2) of this subsection;

(ii) Contracts awarded under (a)(2)(i) of this subsection when the statute expressly requires that the procurement be made from a specified source. (Justification and approval requirements apply when the statute authorizes, but does not require, that the procurement be made from a specified source); . . .