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B-199247, Aug 21, 1980

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B-199247, AUG 21, 1980

DIGEST: 1. GAO GENERALLY WILL NOT REVIEW FEDERAL AGENCY'S DENIAL OF GRANT APPLICATION OR AWARD OF GRANT. 2. UNDER TERMS OF SALTONSTALL-KENNEDY ACT OF 1954, 15 U.S.C. SEC. 713C-3 (1976), SPECIAL FUND CREATED TO PROMOTE AMERICAN FISHERY DEVELOPMENT AND RESEARCH CAN BE USED TO FUND APPROPRIATE DEPARTMENT OF COMMERCE PROJECTS.

FISHERMEN'S MARKETING ASSOCIATION OF WASHINGTON, INC.:

FISHERMEN'S MARKETING ASSOCIATION OF WASHINGTON, INC. (FMAW) OBJECTS TO THE DECISION BY THE DEPARTMENT OF COMMERCE'S NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (NOAA) TO FUND UNDER THE SALTONSTALL-KENNEDY ACT OF 1954, 15 U.S.C. SEC. 713C-3 (1976) (ACT), CERTAIN PROJECTS FOR STRENGTHENING AND DEVELOPING THE UNITED STATES' FISHING INDUSTRY. THE PROJECTS - SEVEN PROPOSED BY NOAA'S NATIONAL MARINE FISHERIES SERVICE (NMFS) AND ONE BY THE MINORITY BUSINESS DEVELOPMENT AGENCY (MBDA) OF THE DEPARTMENT OF COMMERCE - WERE AMONG 33 APPROVED OUT OF APPROXIMATELY 300 APPLICATIONS SUBMITTED IN RESPONSE TO NOTICES OF THE AVAILABILITY OF THE FUNDS PUBLISHED IN THE FEDERAL REGISTER ON NOVEMBER 15, 1979 (44 FED. REG. 65806) AND JANUARY 18, 1980 (45 FED. REG. 3627). FMAW CONTENDS THAT ITS OWN APPLICATION WAS NOT EVALUATED BY NOAA ON AN EQUAL BASIS WITH THE OTHERS. FMAW ALSO ASSERTS THAT IN ANY CASE IT WAS IMPROPER UNDER THE PROVISIONS OF THE ACT AND THE NOTICES FOR THE DEPARTMENT OF COMMERCE TO FUND PROJECTS SUGGESTED BY THE AGENCY'S OWN COMPONENT ORGANIZATIONS FROM THE MONEY ANNOUNCED AS AVAILABLE.

WE DISMISS THE COMPLAINT CONCERNING THE EVALUATION OF APPLICATIONS, AND WE FIND THAT THE ACT DOES NOT PRECLUDE THE FUNDING OF DEPARTMENT OF COMMERCE PROJECTS.

PURSUANT TO OUR PUBLIC NOTICE AT 40 FED. REG. 42406 (1975), WE WILL CONSIDER COMPLAINTS FROM PROSPECTIVE CONTRACTORS CONCERNING THE AWARDS OF CONTRACTS BY GRANTEES UNDER FEDERAL GRANTS IN ORDER TO FOSTER COMPLIANCE WITH GRANT TERMS AND WITH STATUTORY AND AGENCY REGULATIONS. HOWEVER, AS THE PUBLIC NOTICE INDICATES, IT IS NOT OUR INTENTION TO INTERFERE WITH THE FUNCTIONS AND RESPONSIBILITIES OF GRANTOR AGENCIES IN THE ACTUAL AWARDS OF GRANTS. THEREFORE, WE DO NOT GENERALLY CONSIDER OUR OFFICE AS AN APPROPRIATE FORUM IN WHICH COMPLAINTS CONCERNING THE DETAIL OF GRANT APPLICATIONS OR THE ACTUAL AWARDS OF GRANTS OR OTHER ASSISTANCE-TYPE INSTRUMENTS SHOULD BE AIRED, HOME CARE RESEARCH OF ROCHESTER, INC., B-199147, JUNE 24, 1980, 80-1 CPD 444, ALTHOUGH WE HAVE CONSIDERED THE PROPRIETY OF A GRANT AWARD PROCESS TO AVOID THE COMPETITIVE REQUIREMENTS OF THE FEDERAL PROCUREMENT LAWS AND REGULATIONS. SEE BURGOS & ASSOCIATES, INC., 58 COMP.GEN. 785 (1979), 79-2 CPD 194; BLOOMSBURY WEST, INC., B-194229, SEPTEMBER 20, 1979, 79-2 CPD 205. SEE ALSO TRI-COUNTY METROPOLITAN DISTRICT OF OREGON,

B-190706, JULY 21, 1978, 78-2 CPD 58, WHERE A GRANTOR REQUESTED OUR DECISION AS TO WHETHER IT PROPERLY COULD PROVIDE GRANT FUNDING IN THE PARTICULAR CIRCUMSTANCES PRESENT.

ACCORDINGLY, WE WILL NOT REVIEW FMAW'S CONTENTION THAT ITS APPLICATION WAS NOT FAIRLY CONSIDERED BY NOAA, EVEN THOUGH FMAW'S ASSERTIONS IMPLY THAT THE AGENCY MAY HAVE FAVORED THE APPLICATIONS OF ITS OWN ORGANIZATIONS, SINCE THE MATTER ESSENTIALLY INVOLVES A FEDERAL GRANTOR AGENCY'S DETERMINATION WITH RESPECT TO WHICH GRANT APPLICATIONS MERIT FUNDING. SEE TRACEY TROMBLEY CONSTRUCTION COMPANY, INC. - RECONSIDERATION, B-192464, SEPTEMBER 21, 1978, 78-2 CPD 216. THE COMPLAINT IN THAT RESPECT IS DISMISSED.

NEVERTHELESS, CONSISTENT WITH OUR DUTY AT 31 U.S.C. SEC. 53 (1976) TO INVESTIGATE THE RECEIPT, DISBURSEMENT AND APPLICATION OF PUBLIC FUNDS WE BELIEVE IT APPROPRIATE TO DISCUSS THE ISSUE, PRESENTED HERE, AS TO WHETHER A STATUTE THAT PROVIDES AN AGENCY WITH FUNDS FOR A PARTICULAR PURPOSE REQUIRES THAT THEY BE EXPENDED THROUGH ASSISTANCE TYPE INSTRUMENTS, OR WHETHER THE AGENCY INSTEAD CAN ITSELF USE THE FUNDS TO PROMOTE THE CONGRESS' INTENT.

PURSUANT TO THE ACT THE SECRETARY OF AGRICULTURE MUST TRANSFER TO THE SECRETARY OF COMMERCE EACH FISCAL YEAR AN AMOUNT EQUAL TO 30 PERCENT OF THE GROSS RECEIPTS FROM DUTIES ON FISH IMPORTS, TO BE MAINTAINED IN A SEPARATE FUND WHICH IS OFTEN REFERRED TO AS THE S-K FUND. THE STATUTE FURTHER PROVIDES:

"(A) *** (THE S-K FUND) SHALL BE *** USED BY THE SECRETARY OF COMMERCE (1) TO PROMOTE THE FREE FLOW OF DOMESTICALLY PRODUCED FISHERY PRODUCTS IN COMMERCE BY CONDUCTING A FISHERY EDUCATIONAL SERVICE AND FISHERY TECHNOLOGICAL, BIOLOGICAL AND RELATED RESEARCH PROGRAMS, *** AND (2) TO DEVELOP AND INCREASE MARKETS FOR FISHERY PRODUCTS OF DOMESTIC ORIGIN AND (3) TO CONDUCT ANY BIOLOGICAL, TECHNOLOGICAL, OR OTHER RESEARCH PERTAINING TO AMERICAN FISHERIES."

THE NOVEMBER 15, 1979, FEDERAL REGISTER NOTICE ANNOUNCED THE AVAILABILITY OF APPROXIMATELY $10 MILLION OF FISCAL YEAR 1980 FUNDS FOR GRANTS AND COOPERATIVE AGREEMENTS FOR FISHERIES DEVELOPMENT PROJECTS, AND THAT APPLICATIONS "CAN BE MADE BY ANY PERSON OR GROUP INCLUDING FEDERAL, STATE, AND LOCAL GOVERNMENTS, AND DEPARTMENT OF COMMERCE REGIONAL DEVELOPMENT COMMISSIONS IN ACCORDANCE WITH THE PROCEDURES SET FORTH IN THIS NOTICE." THE SUBSEQUENT NOTICE STRESSED THAT THE LEVEL OF NON-FEDERAL COST SHARING WOULD BE AN IMPORTANT FACTOR IN THE SELECTION OF PROJECTS, AND ADVISED:

"THERE MAY BE UNUSUAL INSTANCES WHERE COST-SHARING FROM OTHER THAN FEDERAL SOURCES IS NOT POSSIBLE, AS IN THE CASE WHERE 100 PERCENT OF THE APPLICANT'S REVENUES ARE FROM FEDERAL SOURCES. *** NMFS MAY WAIVE THIS REQUIREMENT FOR A PROJECT IF IT DETERMINES THAT THE NON-FEDERAL COST SHARING REQUIREMENT IS IMPRACTICAL. HOWEVER, IT IS EXPECTED THAT THIS WAIVER WILL BE GRANTED ONLY IN THE MOST UNUSUAL CIRCUMSTANCES."

A LETTER SENT TO PROSPECTIVE APPLICANTS SPECIFICALLY REFERENCED THE S-K FUND AS THE SOURCE OF THE AVAILABLE MONEY, AND STATED THAT "ALL PROPOSALS SUBMITTED WILL BE EVALUATED ON AN EQUAL BASIS."

THE STATUTE AS QUOTED ABOVE PROVIDES BROAD DISCRETION TO THE SECRETARY OF COMMERCE TO USE THE S-K FUND ESSENTIALLY IN WHATEVER MANNER THE SECRETARY CONSIDERS WILL FURTHER THE PURPOSES OF THE ACT. THERE IS NO BASIS TO CONCLUDE THAT IN THE EXERCISE OF THAT DISCRETION THE SECRETARY MAY NOT DETERMINE THAT

THOSE PURPOSES CAN BEST BE PROMOTED IN PROJECTS CONDUCTED BY THE AGENCY'S PERSONNEL. IN FACT, WE POINT OUT THAT HISTORICALLY THE S- K FUND HAS BEEN USED TO SUPPLEMENT MONIES APPROPRIATED TO NOAA FOR OPERATIONS, RESEARCH, AND FACILITIES. SEE E.G., THE BUDGET OF THE UNITED STATES GOVERNMENT FOR FISCAL YEARS 1979 AND 1980, APPENDIX AT 242 AND APPENDIX AT 243, RESPECTIVELY.

FURTHER, WE BELIEVE FMAW SHOULD HAVE KNOWN THAT THE DEPARTMENT OF COMMERCE MIGHT FUND PROJECTS WITH PART OF THE $10 MILLION IN S-K FUNDS ANNOUNCED IN THE NOTICES AS AVAILABLE, SINCE THE NOTICES ALSO ADVISED PROSPECTIVE APPLICANTS THAT APPLICATIONS COULD BE SUBMITTED BY FEDERAL AGENCIES AND DEPARTMENT OF COMMERCE REGIONAL COMMISSIONS, AND THAT CIRCUMSTANCES WOULD EXIST WHERE NON-FEDERAL COST SHARING WOULD BE IMPRACTICAL.

THEREFORE, IN OUR OPINION, IT IS NOT IMPROPER FOR NOAA TO USE THE S K FUND TO FUND DEPARTMENT OF COMMERCE PROJECTS RELATED TO AMERICAN FISHERY DEVELOPMENT AND RESEARCH.