



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Eagle Vision

File: B-272222

Date: September 3, 1996

Dan Hawkins for the protester.

Terrence J. Tychan and Mike Colvin, Department of Health & Human Services, for the agency.

Linda C. Glass, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of agency's rejection of bid due to defective bid bond is dismissed as untimely where initial agency-level protest was untimely filed.
2. Because Buy Indian Act does not require that particular contracts be set aside for exclusive participation of Indian firms, General Accounting Office will not consider protest that procurement should have been restricted to Indian firms absent a clear showing of an abuse of the broad discretion conferred by the act.

DECISION

Eagle Vision protests the cancellation of invitation for bids (IFB) No. 102-IFB-95-0037, issued as a total set-aside for Indian-owned and controlled concerns by the Department of Health and Human Services. The protester contends that its bid was improperly rejected based on the unacceptability of its proposed individual bid bond surety, and objects to the resolicitation of the requirement on an unrestricted basis.

We dismiss the protest.

The IFB was issued on October 26, 1995, as a total set-aside for Indian-owned and controlled concerns pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1994). Three bids were received by the December 12 bid opening. One bid was disqualified because the bidder was not Indian-owned. Eagle Vision's low bid was rejected because of agency concerns about the acceptability of its individual surety supporting the bid bond. The only remaining responsive bid was determined to be unreasonably high. On January 24, 1996, the procurement was converted to negotiated in accordance with Federal Acquisition Regulation (FAR) §14.404-1(e)(1).

On February 6, offers were requested from Eagle Vision and Gordon Construction, the two qualified Indian-owned firms that had bid under the original IFB. Only Eagle Vision submitted an offer by the February 21 closing date for receipt of proposals. By letter dated March 5, Eagle Vision was advised that there were deficiencies with its individual surety that needed to be corrected.

Eagle Vision attempted to clarify the matter and to ameliorate the deficiencies, but by letter of March 13, the contracting officer advised Eagle Vision that its response did not satisfy the agency's concerns regarding the acceptability of the individual sureties. Eagle Vision was requested to provide a best and final offer (BAFO) by March 22, with a new and acceptable bid bond. By letter dated March 22, Eagle Vision advised the contracting officer that a new bid bond had been ordered and that it would be forwarded shortly. On March 22, the agency received Eagle Vision's BAFO, but it did not include a new bid bond. Eagle Vision stated in its BAFO that it had ordered a new bid bond and expected to receive it shortly.

The promised new bid bond was not provided and, on March 28, Eagle Vision was informed that its offer was rejected because of the unacceptability of the individual surety. That letter also advised Eagle Vision that the requirement would be reprocured on an unrestricted basis and that the resolicitation would be advertised in the Commerce Business Daily (CBD). The advertisement for the new solicitation appeared in the CBD on April 18. On April 15, the agency sent Eagle Vision a copy of the presolicitation notice for the new solicitation and on May 13, the protester was sent a copy of the new solicitation. Bid opening under the new solicitation was set for June 13.

On May 28, Eagle Vision protested to the contracting officer objecting to the rejection of its offer and the resolicitation of the requirement on an unrestricted basis. The agency denied the protest on June 5, finding that the protest was untimely to the extent it concerned the unacceptability of Eagle Vision's individual surety. Thereupon, Eagle Vision filed this protest with our Office on June 5, challenging both the agency's determination that Eagle Vision's bid bond was unacceptable and the decision to resolicit on an unrestricted basis.

Under our Bid Protest Regulations, protests not based on alleged solicitation improprieties must be filed no later than 14 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1996). Further, our Regulations provide that a matter initially protested to the agency will be considered only if the initial protest to the agency was filed within the time limits for filing a protest with our Office, unless the contracting agency imposes a more stringent time for filing, in which case the agency's time for filing will control. 4 C.F.R. § 21.2(a)(3); Tandy Constr., Inc., B-238619, Feb. 22, 1990, 90-1 CPD ¶ 206. Thus, to be timely under our Regulations, Eagle Vision's agency-level protest concerning its bid bond was required to have

been filed within 14 calendar days after it learned of the basis of its protest. Having learned on March 28, that the agency had rejected its offer because of the unacceptability of its bid bond, Eagle Vision's initial agency-level protest, filed on May 28, was untimely under our regulations, hence, its subsequent protest to our Office is also untimely.

Eagle Vision also protests the agency's decision to issue the new solicitation on an unrestricted basis. The Buy Indian Act permits the negotiation of contracts for Indian products with Indians to the exclusion of non-Indians. See Bartow Assocs., Inc., B-204287, Aug. 17, 1981, 81-2 CPD ¶ 151. While the Secretary of the Interior has broad discretionary authority to negotiate exclusively with Indian contractors, there is nothing in the Buy Indian Act that requires particular procurements to be set aside for Indians. Under 48 C.F.R. Sec. 380.5 (1995), contracting officers for the Indian Health Service are vested with this discretion for procurements such as the one at issue here. Our Office has held that we limit review of a decision not to restrict procurements to Indian firms only to cases where there has been a prima facie showing that there has been an abuse of the broad discretion conferred by the Buy Indian Act. Pine Ridge Constr. Co., B-221501, Jan. 22, 1986, 86-1 CPD ¶ 71; Oregon Paiute Contractors, Inc., B-216207, Oct. 22, 1984, 84-2 CPD ¶ 433.

Here, Eagle Vision simply objects to the unrestricted nature of the reprourement which in Eagle Vision's view should have been restricted to Indian firms. The agency had converted the requirement to an unrestricted basis because it did not anticipate offers at a fair market price by two or more responsible Indian enterprises based on the fact that the immediate procurement history had not included any offers from responsible Indian-owned firms at a reasonable price. Since Eagle Vision has not provided any viable reason to question this determination, its protest provides no basis for our Office to conclude that there was any abuse of the discretion granted to the agency under the act.

The protest is dismissed.

Comptroller General
of the United States