

04477

4725

Boyle
P.L.I

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-188888

DATE: December 12, 1977

MATTER OF: Department of the Interior--request for advance
decision

DIGEST:

Where otherwise eligible potential offeror cannot obtain certificate of tribal enrollment requested by contracting agency to establish offeror's compliance with solicitation eligibility criterion because (1) Government cannot timely process enrollment applications under its enrollment procedure, and (2) no other tribal enrollment procedure exists, contracting agency should permit offeror to present other information to establish compliance with "Indian" eligibility criterion.

The Department of the Interior requests an advance decision on whether a proposal from AIC Construction, Inc. (AIC), may be properly considered in response to a request for proposals (RFP) soon to be issued for certain construction services solely from the standpoint of the offeror's demonstration of compliance with the RFP's Buy Indian Act provisions.

Interior's request for an advance decision flows from a protest filed here by AIC based on the rejection of AIC's proposal submitted in response to RFP No. BIA-0150-77-2 issued by the Bureau of Indian Affairs for construction of a school in Alakanuk, Alaska. The solicitation was canceled because the construction season ended before an award could be made, thus rendering the protest moot. The Bureau plans, however, to resolicit for that requirement during the coming construction season and anticipates receiving a proposal from AIC. The Bureau believes that a protest on this issue after issuance of the solicitation may result in another construction season being lost.

In response to AIC's request for information concerning solicitation requirements, the Bureau provided a form entitled "Statement of Qualifications for Construction Contract under Buy Indian Act." To establish the Indian status of a firm's owners that form required a list of the names of owners, the number of shares owned by each, and "certification from the appropriate Bureau office as to Indian descent and tribal enrollment," as provided in the Bureau's 20 BIA Bulletin 1, dated March 3, 1976.

B-188888

AIC provided information showing that Mr. Norman L. Ream owned 100 percent of AIC's stock but no information concerning his Indian descent and tribal enrollment.

The contracting officer made verbal inquiries to the Tribal Enrollment Officer, Anchorage Agency, as to Norman L. Ream's membership in a tribe or native village. By telegram the Enrollment Coordinator stated:

"I CAN CERTIFY THAT NORMAN L. REAM IS OF INDIAN DESCENT. CANNOT AT THIS TIME CERTIFY HIS ELIGIBILITY FOR INCLUSION ON THE ALASKA NATIVE ROLL."

Later, in a memorandum the Enrollment Coordinator stated:

"Having talked with Mr. Ream by phone today, I advised him that the best I could do for him would be to provide this quasi-official certificate of eligibility for inclusion on the Alaska Native Roll.

"I have checked the enrollment application submitted by Mr. Ream and find that in all probability he will be certified as eligible. This conclusion is made after reviewing his application plus those of his mother, two sisters and a brother, all of whom are already eligible. The technicality of his possessing an Official Decision which certifies him eligible will be complied with at some undetermined future date."

Subsequently, AIC's proposal for the Alakanuk project was returned, unopened, on the basis that its owner, Mr. Ream, had not established his eligibility for consideration for "Buy Indian" work in that he had not furnished evidence of membership in an Indian tribe or native village as required under 20 BIA Bulletin 1.

The Bureau explains that for purposes of "Buy Indian" contracting, as stated in 20 BIA Bulletin 1, the Commissioner of Indian Affairs

B-138888

defines the term "Indian" as follows: "Indian means a person who is a member of an Indian tribe or otherwise considered to be an Indian by the tribe with which affiliation is claimed." In keeping with the policy, the Bureau has had a longstanding requirement that each individual or those individuals who jointly own firms must furnish evidence of tribal membership as a prequalification for the award of a contract under the "Buy Indian" Act.

AIC contends that it is 100-percent Indian-owned because Mr. Ream is an Alaskan Indian. Based on comments from the Bureau's Enrollment Coordinator, AIC explains that, unlike other Indian tribes, Alaskan Indian tribes had no tribal enrollment procedure until two recent statutes established such rolls. The only current roll relates to the Alaska Native Claims Settlement Act and Mr. Ream is not currently on that roll due solely to the Bureau's internal computer problems resulting in the Bureau's inability to process Mr. Ream's application for enrollment during the past year.

In reply, the Bureau argues that "Buy Indian" contracting provides a "competitive advantage" and accordingly the Bureau must strictly apply its qualification requirements. Mr. Ream could have petitioned the tribe with which he claimed affiliation for a certification of membership. Enrollment under the Alaska Native Claims Settlement Act was merely another alternative.

The Buy Indian Act, 25 U.S.C. § 47 (1970), provides as follows:

"So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior."

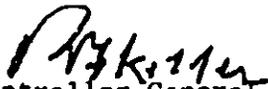
The Secretary of the Interior acting through the Commissioner of Indian Affairs has broad discretionary authority in the implementation of the Buy Indian Act. See Means Construction Company and Davis Construction Company, a joint venture, B-187082, December 14, 1976, 76-2 CPD 483. When reviewing agency determinations made pursuant to broad discretionary authority, such as the quantum of evidence required for an offeror to establish Indian descent and tribal enrollment, we will not disturb such determinations, unless arbitrary, unreasonable, or violative of law or regulation. See,

B-188888

e.g., United Office Machines, 56 Comp. Gen. 411 (1971), 77-1 CPD 195 (negative responsibility determinations); Tracor, Inc., 56 Comp. Gen. 62 (1976), 76-2 CPD 386 (agency's evaluation of proposals).

Unquestionably, Mr. Reams did not provide the requested information to show compliance with the eligibility criterion and in general such a requirement is not unreasonable. However, where, as here, otherwise eligible potential offerors cannot obtain the requested information because (1) the Bureau cannot timely process enrollment applications, and (2) no other tribal enrollment procedure exists, we believe that the Bureau should permit Mr. Ream and other potential offerors to present other information to show compliance with the eligibility criterion of being an Indian, which Mr. Ream admittedly is.

Accordingly, in the resolicitation of the instant construction requirement the Bureau should provide for the submission of other sufficient information by offerors to show eligibility under the Buy Indian Act.


Deputy Comptroller General
of the United States