

Bluth



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Northwest Piping, Inc.

File: B-232644

Date: January 23, 1989

DIGEST

Determination of Bureau of Indian Affairs that a firm meets eligibility criteria for responding to Buy Indian Act procurement will not be disturbed by the General Accounting Office where not shown to be unreasonable, arbitrary, capricious or contrary to law or regulation.

DECISION

Northwest Piping, Inc., protests the award of a contract to Flickertail Paving and Supply under invitation for bids (IFB) No. RDSA00-0635, issued by the Bureau of Indian Affairs (BIA), Department of the Interior, for paving approximately 5 miles of road on the Fort Berthold Indian Reservation, North Dakota. Northwest alleges that the awardee does not qualify as a 51 percent "Buy Indian" concern as required by the IFB, which was set aside for such concerns pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1982). Northwest alleges further that BIA has violated the Administrative Procedures Act, 15 U.S.C. § 553 (1982), by redefining what constitutes an Indian-owned concern from 100 percent owned to 51 percent owned without following mandatory rule-making procedures.

We deny the protest in part and dismiss it in part.

Flickertail submitted the low bid and Northwest the second low bid on July 14, 1988. On July 15 Northwest protested to BIA against the possible award of the contract to Flickertail and requested that the pending award be delayed until Northwest submitted a detailed written protest. On July 29 the contracting officer asked Northwest for a detailed written protest by August 4.

On August 2, Northwest protested that Flickertail's bid should be rejected because that firm did not qualify as a 51 percent Indian-owned concern since it was affiliated with

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Mayo Construction Corporation, a non-Indian-owned enterprise. Northwest submitted evidence that Gregory Mayo served as the secretary, treasurer and director of Mayo and also was the partner of Barbara Mayo, the Indian owner of a 51 percent interest in Flickertail. Northwest contended that this affiliation of a non-Indian firm with Flickertail removes it from the status of an Indian-owned concern, and that, therefore, Flickertail's bid should be rejected. The contracting officer determined that Flickertail met the requirements of a 51 percent Indian-owned concern with no affiliates, denied Northwest's protest and awarded the contract to Flickertail.

Northwest then protested to this Office maintaining that Flickertail does not qualify as a 51 percent Indian-owned concern due to its affiliation with Mayo, a non-Indian firm. Northwest notes that both Flickertail and Mayo have the same physical location; a non-Indian individual is the 49 percent partner of Flickertail as well as a director, officer and primary owner of Mayo, and both Mayo and Flickertail admit that they are related concerns.

This Office has consistently held that who qualifies as a Buy Indian concern is a determination over which the BIA has considerable discretionary authority. The Secretary of the Interior, acting through the BIA Commissioner, has broad discretionary authority to implement the Buy Indian Act, and we have held that defining the criteria a firm must meet to qualify as an Indian enterprise, and the quantum of evidence required to establish compliance with the criteria, falls within that broad discretion. White Buffalo Construction Inc., B-228419, Jan. 22, 1988, 67 Comp. Gen. _____, 88-1 CPD ¶ 61; Department of the Interior--Request for Advance Decision, B-188888, Dec. 12, 1977, 77-2 CPD ¶ 454. We will disturb such decisions therefore, only where they are unreasonable, arbitrary, capricious or in violation of a law or regulation. Id.

The BIA based its determination that Flickertail qualifies under the Buy Indian Act on several factors. First, Flickertail certified in its bid that it was a 51 percent Indian-owned and controlled business and affirmed that it was a wholly owned business concern and had no affiliates, either directly or indirectly. In this regard, Barbara Mayo, who owns 51 percent of Flickertail, is certified to be of Indian blood and an enrolled member of the three affiliated tribes on the Fort Berthold Reservation. A letter dated April 8, 1983, issued by BIA's Chief, Branch of Contract Services, Facilities Engineering Staff, Albuquerque, New Mexico, was also included in Flickertail's

bid, and stated that Flickertail qualified as a 51 percent Indian-owned business.

The BIA further contends that the credit report that Northwest submitted to prove the affiliation between Mayo and Flickertail fails to substantiate its claim. The BIA argues that in fact the report shows that there are no loans and guarantees between Flickertail and Mayo and that Flickertail rents its own facilities, has an established record-keeping system, reports under its own name to the Internal Revenue Service, and has established its own business track record in prior federal, state, municipal and county government contracts. Based upon these facts, the BIA concluded that Flickertail qualified as an Indian-owned concern. We cannot find that the agency's determination that Flickertail qualifies as an Indian-owned concern was unreasonable, arbitrary, capricious or in violation of law or regulation.

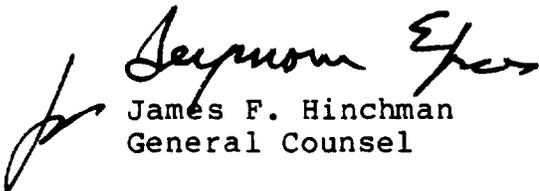
On November 4, Northwest submitted an amended protest to our Office in which it contended for the first time that BIA violated the Administrative Procedures Act, 5 U.S.C. § 553, with respect to its formal rule-making procedures. Northwest contends that although since 1971 it has been the policy of the BIA to restrict competition in Buy Indian set asides to 100 percent Indian-owned and operated concerns, on January 12, 1988, BIA changed this criterion to 51 percent Indian-owned and operated. Northwest contends that this change constitutes a "rule" under the Administrative Procedures Act, and, as such, this change may not be applied until the agency has completed the mandatory formal rule-making procedures contained in 5 U.S.C. § 553. On June 30, 1988, BIA publish a proposed rule in the Federal Register implementing the 51 percent Indian ownership criterion for solicitations set aside under the Buy Indian Act. No final rule has been published.

The BIA contends that our Office should not consider this issue, since the 51 percent rule was apparent on the face of the IFB, such that this protest basis is untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2 (1988). In the alternative, the contracting agency argues that the new definition of a qualifying Indian-owned concern is not a rule, but rather is merely an internal policy change, which does not give rise to enforceable rights on the part of bidders. wSee Blue Lake Forest Products, Inc., B-224263, Feb. 9, 1987, 87-1 CPD ¶ 135.

We agree with the BIA that this issue is untimely under our Bid Protest Regulations. The IFB, issued on June 6, 1988, with bid opening on July 14, specifically contained the

51 percent standard, yet Northwest did not raise the issue until November 4. Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed prior to bid opening in order to be timely. 4 C.F.R. § 21.2(a)(1). Since the Indian ownership standard to be applied was apparent from the IFB, a protest of the propriety of this standard was required to be filed prior to bid opening. Since this protest was filed not only after the award had been made, but after we received BIA's report on the protest, we dismiss this additional protest basis as untimely.

Northwest requests that if we find this protest basis untimely, we consider it pursuant to the exception in our timeliness rules for a protest that raises issues significant to the procurement system. See 4 C.F.R. § 21.2(a). However, this exception is strictly construed and sparingly used to prevent the timeliness rules from being rendered meaningless, and we will invoke it only if the subject of the protest concerns a matter of widespread interest to the procurement community and involves a matter that has not been considered on the merits in prior decisions. Systems Research Laboratories, Inc., B-229968, Mar. 21, 1988, 88-1 CPD ¶ 293. Northwest's protest does not fall within this exception, since the BIA's redefinition of an Indian contractor is not a procurement issue of widespread interest.


James F. Hinchman
General Counsel