Ashen

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Technical Management Services Company

File: B-238216

Date: April 5, 1990

Karl Johnson, Esq., for the protester.
Daniel S. Press, Esq., Van Ness, Feldman & Curtis, for the interested party, American Indian Council of Architects and Engineers.
Sherry Kinland Kaswell, Esq., Department of the Interior, for the agency.
David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Determination of Bureau of Indian Affairs that joint venture comprised of Indian-owned concern and concern not Indian-owned does not qualify as a 51 percent Buy Indian Act concern, as required by the solicitation, is not unreasonable where, although the Indian firm controls 51 percent of the joint venture, only 55 percent of the Indian firm is owned by Indians and the aggregate total of Indian ownership of the joint venture therefore amounts to only 28 percent.

2. The fact that, under an agency's protest regulations, an agency-level protest may be untimely or the protester may lack interested party status, does not provide a basis for questioning the agency's subsequent determination to undertake corrective action based on information presented in connection with the protest.

DECISION

Technical Management Services Company (TMS), protests the decision of the Bureau of Indian Affairs (BIA), Department of the Interior, not to negotiate an architect-engineer (A-E) contract with a joint venture comprised of TMS and Burns, Peters, Long and Waters, Inc. (BPLW), under solicitation No. BIA-89-06, for design and engineering services for the Pine Ridge High School, on the Pine Ridge Reservation in

South Dakota. TMS challenges the agency's determination that TMS does not qualify as a 51 percent "Buy Indian" concern as required by the solicitation, which was set aside for such concerns pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1982).

We deny the protest.

The solicitation was synopsized in the Commerce Business Daily (CBD) on April 12, 1989, pursuant to the selection procedures set forth in the Brooks Act, 40 U.S.C. §§ 541-544 (1982), which governs the procurement of A-E services, and in the implementing regulations at Federal Acquisition Regulation (FAR) §§ 36.00-36.09. Generally, under these procedures, an A-E evaluation board set up by the agency evaluates the A-E performance data and statements of qualifications already on file, as well as those submitted in response to the required public announcement of the particular project, and selects at least three firms for discussions. The board recommends to the selection official no fewer than the three firms deemed most highly qualified. Negotiations then are held with the firm ranked first. If the agency is unable to agree with that firm as to a fair and reasonable fee, negotiations are terminated and the second-ranked firm is invited to submit its proposed fee, and so on. See generally FAR subpart 36.6.

Twenty firms responded to the CBD announcement for the proposed project, the qualifications of the firms were evaluated pursuant to the A-E procedures, and by June 19 BIA had selected three firms as most qualified, with the TMS/BPLW joint venture ranked first. BIA commenced negotiations with the joint venture to determine a reasonable fee, and the joint venture met twice with the Pine Ridge School Board concerning the project. On October 30, however, the American Indian Council of Architects and Engineers (AICAE) filed a protest with the contracting officer challenging the joint venture's eligibility as a Buy Indian concern.

In its protest, AICAE pointed out that while the joint venture agreement allocated TMS 51 percent of the management of the joint venture, TMS was only 55 percent Indian-owned and there was no indication of any Indian ownership of BPLW. AICAE questioned whether this satisfied the eligibility requirement set forth in the solicitation and in the BIA Manual (incorporated by reference into the solicitation), that the A-E concern be "51 percent Indian-owned." On December 18, the contracting officer determined that the TMS/BPLW joint venture did not qualify as a 51 percent Indian-owned firm and therefore was ineligible for award.

TMS challenges BIA's interpretation of what constitutes an eligible Buy Indian concern. BIA has explained that, with respect to joint ventures, it considers the ownership of the enterprise as a whole, and not merely the ownership of the individual parties to the concern. Since TMS is only 55 percent Indian-owned and holds only a 51 percent interest in the joint venture, the agency views the total Indian ownership of the joint venture as a whole as amounting to only 28 percent, that is, 55 percent of TMS' 51 percent share in the joint venture.

TMS, on the other hand, argues that since TMS controls 51 percent of the joint venture and TMS itself is Indian-owned--in that its majority owner is an Indian--the joint venture should be considered Indian-owned. In other words, TMS' position, in effect, is that Indian-managed and -controlled firms automatically should qualify as eligible Buy Indian Act concerns. TMS maintains that this interpretation of the Buy Indian Act requirement is consistent with the interpretation of other agencies, which have awarded contracts to the TMS/BPLW joint venture.

We find nothing improper in BIA's approach to implementing the Act. While management and control are proper considerations in determining a firm's eligibility to participate in Buy Indian Act procurements, nothing in the Act precludes the agency from considering other, additional criteria in determining eligibility.1/ BIA's more restrictive Indian ownership definition assures that the economic opportunities and benefits available under the Act will accrue principally to those firms with the greatest Indian involvement, both with respect to management and profits. Consequently, while the Indian participants in the TMS/BPLW joint venture may be precluded from benefitting under the set-aside here due to BIA's policy, this result flows from a policy aimed at benefitting Indians to the maximum extent possible through the limited number of contract awards available. By making benefits available to firms with much less Indian ownership, TMS' less restrictive interpretation could facilitate the use of "front" companies and, thus, the award of contracts under Indian set-asides that would principally benefit non-

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1/ In this regard, BIA's proposed regulations for implementing the Buy Indian Act, 53 Fed. Reg. 24,738-24,747 (1988) (to be codified at 48 C.F.R. §§ 1452 and 1480), require not only that one or more of the Indian owners be involved in the daily business management of the enterprise, but also that a majority of earnings accrue to the Indians owning 51 percent of the enterprise. 53 Fed. Reg. 24,741.

Indian firms or individuals. BIA's policy tending to avoid this result is reasonable. This being the case, it is irrelevant that other agencies may have used different methods of calculating the percentage of Indian ownership for purposes of determining Indian set-aside eligibility. See Northwest Piping, Inc., B-232644, Jan. 23, 1989, 89-1 CPD ¶ 53.

TMS asserts that under the draft agency protest regulations proposed but not yet adopted by BIA: (1) AICAE's agency-level protest was untimely; (2) AICAE lacked interested party status to file a protest; (3) the contracting officer improperly failed to refer the protest to higher-level officials; and (4) the contracting officer failed to provide TMS with proper notice of the basis for sustaining the agency-level protest. TMS argues that these purported deficiencies in the protest and in the agency's handling of the protest requires our Office to reverse the determination of ineligibility.

This argument is without merit. Our review of a protest is directed solely towards consideration of whether the complained of agency action was reasonable; where we find the agency acted properly, the event that prompted the agency's action is irrelevant. We already have found that BIA properly determined the TMS/BPLW joint venture to be other than a Buy Indian firm and thus ineligible for award. It is of no import that this determination followed AICAE's allegedly unacceptable agency protest. See generally Amarillo Aircraft Sales & Servs., Inc., B-214225, Sept. 10, 1984, 84-2 CPD ¶ 269.

The protest is denied.

Robert P. Murphy
for James F. Hinchman
General Counsel