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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Technical Management Services Company -- Request for Reconsideration

File: B-238216.2

Date: July 17, 1990

Karl Johnson, Esq., for the protester.
Sherry Kinland Kaswell, Esq., Department of the Interior, for the agency.
Jeanne Isrin, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Denial of protest of Bureau of Indian Affairs' determination that joint venture did not qualify as a Buy Indian Act concern, as required by the solicitation, is affirmed where agency interpretation, which resulted from an agency-level protest following the commencement of negotiations with the protester, effected no actual change in agency policy, but instead was consistent with the agency's published draft regulations and was a reasonable implementation of the Act; in these circumstances, the agency was not required to afford protester an opportunity to reorganize or reimburse protester its negotiation costs.

DECISION

Technical Management Services Company (TMS) requests reconsideration of our decision Technical Management Servs. Co., B-238216, Apr. 5, 1990, 69 Comp. Gen. ___, 90-1 CPD ¶ 370, in which we denied its protest of a decision by 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.

We affirm the decision.

After the TMS/BPLW joint venture was selected as most highly qualified among the firms responding to the announcement of the procurement, discussions were begun with it to determine

a reasonable fee. However, the American Indian Council of Architects and Engineers (AICAE) then filed a protest with the contracting officer questioning whether the joint venture qualified as a "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 (1988). The solicitation required that the chosen firm be "51 percent Indian-owned," and AICAE pointed out that TMS was only 55 percent Indian-owned and held only a 51 percent interest in the joint venture. BIA ultimately determined that the total Indian ownership of the joint venture in fact was only 55 percent of TMS' 51 percent share in the joint venture, or 28 percent, and that the TMS/BPLW joint venture therefore did not meet the "Buy Indian" requirement and was ineligible for award. TMS then protested, arguing that since TMS itself is Indian-owned, in that its majority owner is an Indian, and since TMS controls 51 percent of the joint venture, the joint venture should be considered Indian-owned.

We denied TMS' protest, finding nothing improper in BIA's approach to determining which firms would qualify as Buy Indian Act concerns. We noted that nothing in the Act itself precluded BIA's interpretation. Furthermore, we found that BIA's interpretation furthered the spirit of the Act in that economic opportunities and benefits under the Act would accrue principally to those firms with the greatest Indian involvement. Hence, although Indian participants in the TMS/BPLW joint venture would not benefit, this result flowed from a policy aimed at benefiting Indians to the maximum extent possible through the limited number of contract awards available. In addition, we note that BIA's interpretation further promoted the spirit of the Act in that its requirement for greater Indian involvement made it more difficult to use "front" companies, whereby contracts could benefit principally non-Indian firms or individuals.

In its request for reconsideration, TMS argues that we failed to consider certain arguments raised in its initial protest. TMS questions what it views as a change in BIA's policy during the negotiation process. According to TMS, other agencies have interpreted the Buy Indian Act so as to permit joint ventures such as TMS/BPLW to compete, while the BIA itself encouraged submission of proposals by joint ventures and did not expressly prohibit joint ventures such as TMS/BPLW from competing. TMS argues that because of BIA's purported failure to take exception to the interpretation of the Act's eligibility requirements adopted by other agencies, BIA's encouragement of joint ventures could only be taken to mean that TMS/BPLW would be eligible for this

contract. In light of what it views as a subsequent agency change in policy (leading to the rejection of its proposal), TMS argues that BIA should at least have issued a new solicitation and solicited new proposals so that TMS could alter its business organization in order to meet the revised eligibility standard. In addition, it believes that it should be reimbursed more than $15,000 for proposal preparation and protest costs.

We find no evidence of a change in BIA policy as to which firms would be eligible to compete as Buy Indian Act concerns. TMS does not allege, nor does the record indicate, that BIA ever adopted an express policy that Indian-controlled enterprises owned predominantly by non-Indians would be considered eligible to participate in Buy Indian Act procurements. On the contrary, the record indicates that BIA had given every indication that such enterprises would not be considered eligible Buy Indian Act concerns. Specifically, 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. §§ 452 and 1480), required not only that one or more 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.

BIA preliminarily accepted the TMS/BPLW proposal because the enterprise certified its eligibility as a Buy Indian Act concern, that is, that it was at least 51 percent Indian-owned. A contracting officer may rely upon an offeror's self-certification of status in the absence of reason to question the certification. See American Mobilphone Paging, Inc., B-238027, Apr. 5, 1990, 90-1 CPD ¶ 366 (self-certification as small business). The subsequent agency determination that the TMS/BPLW joint venture did not meet the 51-percent Indian-ownership requirement did not result from any change in policy, but instead appears to have been the result of information furnished by AICAE following the opening of negotiations with TMS. There was nothing improper in BIA's determination, based upon this additional information, that the TMS/BPLW joint venture did not qualify as a Buy Indian concern, or in its consequent elimination of the concern from the competition without an opportunity to reorganize.

In addition, we find no basis for the recovery of the costs incurred by the TMS/BPLW joint venture in the negotiation process. Again, it appears that the BIA entered negotiations with the joint venture in good faith, fully intending to negotiate a contract with the firm deemed most highly

qualified from a technical standpoint, if possible. There is no basis for recovery of the costs of competing or protesting where, as here, there was no improper agency action. See generally 120 Church Street Assocs., B-232139.5, Feb. 28, 1990, 90-1 CPD ¶ 244.

The prior decision is affirmed.

James F. Hinchman
General Counsel