



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Eagle Nest, Inc.

**File :** B-240943

**Date:** December 19, 1990

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Judith A. Atkinson, Esq., for the protester.  
Sherry Kinland Kaswell, Esq., Department of the Interior, for the agency.  
C. Douglas McArthur, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Where record shows that under Indian set-aside, agency reasonably accepted awardee's self-certification as Indian firm after verifying status on National Roster which identifies Indian firms, General Accounting Office will not disturb performance of contract because 6 months later, under separate solicitation, agency concludes firm is not in fact eligible for Indian set-asides.

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### DECISION

Eagle Nest, Inc. protests the award of a contract to R&D Construction, Inc. under invitation for bids (IFB) No. RDSA00-0805, a set-aside for Indian economic enterprises under the Buy Indian Act, 25 U.S.C. § 47 (1988), issued by the Bureau of Indian Affairs for construction work. The protester believes that the agency should terminate the contract in view of its decision, 6 months after award, to de-certify the awardee as an eligible Indian-owned enterprise.

We deny the protest.

On June 2, 1989, the agency issued the solicitation for grading and surface work on a road in the Fort Berthold Indian Reservation in North Dakota. The agency issued the solicitation as a set-aside for Indian economic enterprises which was defined as firms that were 51-percent Indian owned. The IFB further defined the term "Indian" to include a person who was "a member of an Indian tribe."

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On February 16, 1990, the agency awarded a contract for the Fort Berthold project to R&D Construction, which had submitted the lowest bid and had certified itself as an eligible Indian economic enterprise. In accepting the certification by R&D, the contracting officer also checked the National Roster of Indian/Alaska Native Economic Enterprises (National Roster) which showed R&D as a 100 percent Buy Indian contractor.

On June 15, 1990, the agency opened bids under IFB No. RDSA00-0849, for another road project on the Pine Ridge Reservation and found that R&D Construction had again submitted the lowest bid, certifying itself as an Indian economic enterprise. On June 26, Northwest Piping, Inc. filed a protest with the agency over award of a contract to R&D Construction for the Pine Ridge project, questioning the potential awardee's eligibility as an Indian economic enterprise.<sup>1/</sup>

In response to Northwest Piping's challenge of R&D's Indian firm status, the contracting officer referred to a Bureau of Indian Affairs manual which provides that for a firm to be eligible for the program, the majority owner of the firm must be a member of an Indian tribe or considered to be an Indian by a Tribe with which he claims affiliation. The owner of R&D Construction claimed affiliation with the Wind River Shoshone as a nonenrolled Shoshone of 3/16 Indian blood; the enrollment clerk of the Shoshone tribe advised the contracting officer, however, that the tribe only recognized enrolled members as affiliated with the tribe. Accordingly, in August, 6 months after the Fort Berthold award, the contracting officer determined that regardless of the owner's ancestry, R&D Construction did not qualify for the Indian preference, rejected R&D's bid for the Pine River project and removed its name from the agency's list of eligible Indian contractors.

On August 28, Eagle Nest filed a protest with our Office, alleging that R&D Construction had falsely certified itself as an Indian economic enterprise on the Fort Berthold project. The protester believes that by relying on the bidder's self-certification, the agency failed in its obligation to verify the awardee's status and that the award was void, in view of the awardee's false certification. The protester advises our Office that owing to an archaeological discovery, the agency has temporarily suspended work on the Fort Berthold project; the protester urges that we recommend that the agency terminate its contract with R&D Construction.

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<sup>1/</sup> Northwest Piping did not question whether the owner of R&D Construction was a member of an Indian tribe, but charged that the low bidder was a front for an ineligible concern.

In determining which firms qualify as Indian enterprises under the Buy Indian Act, in the absence of evidence to the contrary, the agency may rely upon the bidder's own self-certification of status. Technical Management Servs. Co.-- Recon., B-238216.2, July 17, 1990, 90-2 CPD ¶ 40. Here, while the contracting officer relied on the certification, he also verified R&D's status by reference to the National Roster which included R&D. The record fails to show that the contracting officer's acceptance of R&D's status as an Indian firm was erroneous or unreasonable at the time it was made.<sup>2/</sup> The later determination that the awardee did not in fact qualify under the Act does not show that the contracting officer's acceptance of the certification for the Fort Berthold project was improper since there is nothing to even suggest that the contracting officer knew or should have known that the certification was incorrect at the time of award. Apparently, the rejection of R&D's bid for the more recent project was based, in part, on the agency's recent policy of referring eligibility questions to the tribes rather than relying solely on agency records.

The protest is denied.

  
for James F. Hinchman  
General Counsel

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<sup>2/</sup> The protester did not challenge R&D's certification regarding the Fort Berthold project at the time the award was made.