



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Black Construction Corporation

**File:** B-250647; B-250647.2

**Date:** February 8, 1993

Richard F. Smith, Esq., John S. Pachter, Esq., and Jonathan D. Shaffer, Esq., Smith, Pachter, McWhorter & D'Ambrosio, for the protester, James A. Sparks, Esq., and Paul F. Fisher, Esq., Department of the Navy, for the agency. Barbara C. Coles, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest that awardee is a foreign corporation and ineligible to receive construction contract under the American Preference Policy is denied where record establishes that corporation qualifies as a United States contractor.

### DECISION

Black Construction Corporation protests the award of a contract to Hanil Resorts (Joint Venture) Corporation under invitation for bids (IFB) No. N62766-88-B-0206, issued by the Department of the Navy for the alteration of enlisted personnel housing at Andersen Air Force Base, Guam.

We deny the protests.

The IFB was issued on July 27, 1992, and was amended twice prior to bid opening. One amendment incorporated the American Preference Policy, which precludes the award of a construction contract, estimated by the government to exceed \$1 million, to a foreign contractor, unless the lowest responsive bid of a United States contractor exceeds the lowest responsive bid of a foreign contractor by more than 20 percent. To qualify as a United States contractor, the firm (or if a joint venture, all members of the joint venture) must be incorporated in the United States and comply with the following: (1) the corporate headquarters must be in the United States; (2) the firm must have filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), must have filed state and federal income tax returns (if required) for 2 years, and must have paid any taxes due as a result of

these filings; and (3) the firm must employ United States citizens in key management positions.

The Navy received four bids by the September 3 bid opening date; Hanil was the apparent low bidder with a bid of \$5,665,000, and Black was the second low bidder with a bid of \$6,064,000. The IFB included the provision at Federal Acquisition Regulation (FAR) § 52.214-2, entitled "Type of Business Organization-Sealed Bidding"; in response to this provision, Hanil certified that it operates as a corporation incorporated under the laws of Guam. After reviewing information pertaining to Hanil's corporate status, the contracting officer concluded that Hanil qualified as a United States contractor under the terms of the American Preference Policy clause. By letter dated September 25, Black filed an agency-level protest challenging the proposed award to Hanil on the basis that Hanil is a foreign contractor.

The contracting officer advised Black that he reached his determination that Hanil was eligible for award as a United States contractor after obtaining Hanil's articles of incorporation and communicating with Guam's Department of Revenue and Taxation. The contracting officer explained that Hanil is a single corporation rather than a joint venture, as its name implies, and that it was incorporated on September 13, 1989, under the laws of Guam. The contracting officer also explained that Hanil has filed tax returns in the territory of Guam for more than 2 years and its corporate headquarters has been in Guam since the corporation's inception. The contracting officer advised Black that Hanil has four key management positions; two positions (president and general manager/marketing director) are filled by Korean citizens and the other two positions (secretary and contract administrator) are filled by United States citizens. After receiving this letter, Black filed a protest with our Office challenging the contracting officer's determination and the resulting award to Hanil. The agency has suspended performance under the contract pending our resolution of the protest.

Black's protest to our Office is essentially a reiteration of the allegation that it raised in its agency-level protest, namely, that the contracting agency's "objective determination that Hanil is a United States contractor under the American Preference Policy clause" was improper. To support its allegation, Black asserts that if the agency had conducted a thorough investigation to determine whether or not Hanil is a United States contractor, it would have concluded that Hanil does not employ United States citizens in key management positions but rather is owned, managed, and controlled by Korean citizens. As a result, the protester requests that we recommend that the agency

terminate its contract with Hanil and make award to the protester.

The American Preference Policy, as set forth in the Military Construction Appropriations Act of 1992,<sup>1</sup> Pub. L. No. 102-136, 105 Stat. 637 (1991), states in pertinent part that:

"None of the funds appropriated in this Act for military construction in the United States territories and possessions in the Pacific and on Kwajalein Island may be used to award any contract estimated by the [g]overnment to exceed \$1,000,000 to a foreign contractor; Provided, that this section shall not be applicable to contract awards for which the lowest responsive and responsible bid of a United States contractor exceeds the lowest responsive and responsible bid of a foreign contractor by greater than 20 per centum."

As defined in the IFB, a United States contractor for the purposes of the American Preference Policy is a firm that has corporate headquarters in the United States; has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed state and federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and employs United States citizens in key management positions. As stated above, Hanil certified in its bid that it is not a

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<sup>1</sup>Initially, Congress directed the Department of Defense to develop a preference plan for United States contractors in the award of construction contracts in the Persian Gulf/Indian Ocean area in order to stimulate the use of United States firms in the area and to assure the regional availability of companies that were responsive to United States interests and requirements. H.R. Conf. Rep. No. 1433, 96th Cong., 2d Sess. 4 (1980). In 1983, the House Appropriations Committee received testimony that the presence of American contractors in the Pacific was decreasing despite the fact that the military construction program in the area was increasing dramatically. Similar to the earlier concerns about the Persian Gulf area, it appeared that without some type of American preference program, the majority of United States funded projects in the Pacific would be awarded to foreign firms. To increase the opportunities for American construction firms in the Pacific area, Congress in the Second Supplemental Appropriations Act of 1984, Pub. L. No. 98-396, 98 Stat. 1398 (1984), first instituted an American Preference Policy in the American territories of the Pacific and on Kwajalein Island.

foreign contractor, and thus, by implication, that it is a United States contractor.

The protester contends that the award to Hanil is improper because the awardee does not employ United States citizens in key management positions. According to the protester, the agency's determination that the awardee employs United States citizens in key management positions was improper because two of the three corporate officers, including the ranking corporate officer, are Korean citizens, and because two of the three corporate directors are Korean citizens.

The protester's reliance on the number of corporate officers or directors, as well as the type of offices held in the corporation by United States citizens, as the determinative factor for qualification under the American Preference Policy is misplaced. The American Preference Policy neither requires that a specific number of officers or directors be United States citizens, nor mandates that an employee hold a corporate office in order to be considered a key management employee. In this regard, there is no indication that Congress intended the policy to be applied as narrowly as the protester suggests; rather, the legislative history indicates simply that in order to qualify as a United States contractor, a construction firm should, in addition to other requirements, employ United States personnel in key management and supervisory positions. See, e.g., H.R. Rep. No. 238, 98th Cong., 1st Sess. 14 (1983).

In support of its position, the protester cites Samwhan Am. et al. v. Captain G.B. Estes, No. 86-0033 (D. Guam July 16, 1986). In Samwhan, the court merely made a finding of fact that the plaintiff qualified as a United States contractor because the firm employed United States citizens in key management positions, namely, as president and vice president. Contrary to the protester's suggestion, the court did not find that key employees must be corporate officers.

The protester also contends that the awardee cannot qualify as a United States contractor because the majority of its corporate officers are not United States citizens, citing MWK Int'l Ltd. et al. v. United States, 2 Cl. Ct. 206 (1983). The solicitation at issue in MWK restricted the competition to United States contractors and specifically stated that to qualify as a United States contractor, the bidder must have, in addition to other factors, a majority of corporate officers who are United States citizens. In contrast, the solicitation here does not require that the contractor employ a majority of United States citizens as corporate officers. Accordingly, unlike in MWK, the fact that the majority of the awardee's corporate officers are

not United States citizens is not dispositive of its eligibility under the American Preference Policy.

With regard to the contracting officer's conclusion that the awardee employs two United States citizens in key management positions--corporate secretary and contract administrator--the protester contends that a thorough review by the contracting agency would have revealed that neither the corporation's secretary nor its contract administrator performs key management duties. The protester claims that the secretary's duties are limited to those of outside legal counsel; therefore, the secretary cannot be considered to hold a key management position within the firm. The protester also claims that the secretary holds the same position with other Guam corporations. As for the contract administrator, the protester alleges that he was recently elevated to this position and that he previously lacked any supervisory duties. According to the protester, the agency should have analyzed the following factors in determining whether these employees provide key management duties: (1) time devoted by the individual to the entity's business; (2) primary physical location of the individual; (3) written responsibilities of the individual; (4) ability of the individual to legally bind the corporation; and (5) whether the individual performs a sufficient management function to be exempt from overtime.

While the protester suggests that the secretary, who is an attorney, plays only a limited role in the corporation's activities, the secretary's description of his level of involvement reasonably supports the contracting officer's determination that the secretary is part of the corporation's key management. In describing his duties, the secretary states that he is consulted "on a weekly or monthly basis concerning projects that the corporation is working on, property holdings, submittals of documents to the government . . . and . . . hiring and firing of employees," and has "much more to do with the day to day operation of the corporation" than does the General Manager, who is a Korean citizen. The secretary also confirms that the second key management employee identified by Hanil, the contract administrator, has been given the necessary authority to handle "all aspects of the management of this contract on behalf of [the] corporation." The secretary, whose interest in the corporation is also that of a minority shareholder, concludes by stating that he and the contract administrator together "would handle all of the key decisions of the corporation and . . . provide "one hundred percent (100%) of the management for the company."

We see no basis to conclude that the contracting officer was required to do a more in-depth investigation into the nature of the two individuals' duties. The protester does not

allege and the record does not suggest that the contracting officer should have suspected that the information he received concerning the corporation's key employees was inaccurate. While the protester states that it bases its suspicions on its dealing with the awardee, there is no evidence in the record that even remotely suggests that the contracting officer had or should have had any knowledge about the corporation or its employees that should have caused him to question Hanil's eligibility under the American Preference Policy. Absent, for example, documented complaints or suspicions prior to his award decision that the awardee is actually foreign-owned and operated within the meaning of the American Preference Policy, an exhaustive investigation into the factors suggested by the protester was not required.

The record does not support the protester's argument that the award was improper because, according to the protester, the major shareholder in the corporation is a Korean citizen. The solicitation provision containing the American Preference Policy did not include a stock requirement; therefore, it would have been improper for the contracting agency to have imposed such a requirement after receipt of bids.

The protester also contends that the award to Hanil is improper because Hanil has not met the American Preference Policy's tax requirements. In essence, the protester claims that the agency failed to investigate whether Hanil has paid taxes due. In investigating Hanil's compliance with the tax filing and payment requirements, the contracting officer contacted Guam's Department of Revenue and Taxation and was informed that Hanil had filed tax returns in Guam for more than 2 years. The contract administrator's staff verified this information and learned that Hanil did not owe any territorial taxes as a result of these filings.<sup>2</sup>


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<sup>2</sup>A declaration filed by the contract administrator describing her inquiry into Hanil's compliance with the tax requirements refers to the firm as "Hanil Resorts, JV, Corporation Services, Inc." The agency has indicated that the reference was simply a typographical error and that the tax information it received did in fact pertain to the protester, Hanil Resorts (Joint Venture) Corporation.

Consequently, the record establishes that Hanil met the tax requirements under the American Preference Policy.

The protests are denied.



 James F. Hinchman  
General Counsel