



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tomahawk Construction Company

File: B-254938

Date: January 27, 1994

William L. Bruckner, Esq., Corona & Balistreri, for the protester.

Sherry Kinland Kaswell, Esq., and Justin P. Patterson, Esq., Department of the Interior, for the agency.

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DIGEST

The Bureau of Indian Affairs reasonably determined that the low bidder did not qualify as an Indian economic enterprise eligible for award of a contract under a Buy Indian Act set-aside because the bidder's majority owner, who claimed some Indian lineal descent, was reasonably not considered an Indian for the purposes of the set-aside because he was not a member of a federally recognized Indian tribe.

DECISION

Tomahawk Construction Company protests the rejection of its bid and the award of a contract to Blaze Construction Company, Inc., under invitation for bids (IFB) No. SB-93-0029, issued as a total set-aside for Indian-owned and controlled concerns by the Bureau of Indian Affairs (BIA), Department of the Interior, for road construction on the Pyramid Lake Indian Reservation, Nevada. The protester challenges the contracting officer's determination that Tomahawk does not qualify as an "eligible Indian economic enterprise" for the purposes of this procurement.

We deny the protest.

The IFB was issued on June 10, 1993, as a total set-aside for Indian-owned and controlled concerns pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1988). The IFB required each bidder to certify that it was an "eligible Indian economic enterprise." The IFB stated that the term "[e]ligible" means that the majority owner of an Indian economic enterprise . . . meets both the definitions of 'Indian' and of 'Indian economic enterprise' as set forth in this portion of the IFB." The IFB defined "Indian" in

relevant part as "a person who is a member of an Indian tribe, as defined herein," and defined "Indian tribe" as "any Indian tribe, band, nation, rancheria, pueblo, colony or community which is Federally recognized as eligible by the U.S. Government through the Secretary [of the Interior] for special programs and services provided by the Secretary to Indians because of their status as Indians."¹

Five bids were received by the July 12 bid opening date, with Tomahawk submitting the apparent low bid of \$2,224,129, and Blaze the second low bid of \$2,283,489. In its bid, Tomahawk certified that it was an eligible Indian economic enterprise.

In response to requests made by the contracting officer, Tomahawk submitted documentation in support of its certification as an eligible Indian economic enterprise. Specifically, Tomahawk provided a letter from the BIA dated April 18, 1980, stating that Tomahawk's majority owner, Delmar A. Janovec, had been determined to be a descendant of the Mdewakanton-Wahpakoota band of the Sioux tribe, and was entitled to a distribution of the tribe's judgment under the Act of October 25, 1972, Pub. L. No. 92-555, 86 Stat. 1168 (1972) (providing for the disposition of funds appropriated to pay a judgment in favor of the Mississippi Sioux Indians), and a letter from the Heart of America Indian Center (a social service organization) dated August 4, 1993, stating, among other things, that Mr. Janovec is an enrolled member of the Mdewakanton Sioux tribe. Tomahawk also submitted an undated letter from BIA's Aberdeen, South Dakota, area office stating that, based on a questionnaire Tomahawk had completed, the firm had been certified to receive solicitations set aside for Indian-owned and controlled firms, and that BIA's Washington office would be notified of Tomahawk's status "as a potential Buy Indian contractor." Finally, Tomahawk furnished a letter from BIA's Anadarko, Oklahoma, area office, dated May 25, 1984, stating that because of the actions taken by the Aberdeen area office, Tomahawk was on the Anadarko office's mailing list "as a potential 'Buy-Indian' contractor."

The contracting officer contacted BIA's Aberdeen office and was informed that, according to its records, Mr. Janovec was not an enrolled member of any Sioux tribe, and further, that most Sioux tribes require a 1/4 blood quantum to be eligible for enrollment, whereas Mr. Janovec had been determined to have a blood quantum of 3/32. The contracting officer next contacted four Sioux tribal offices, each of which confirmed

¹The language in the IFB setting forth the criteria for consideration as an eligible Indian economic enterprise is identical to that in the BIA Manual (BIAM) § 2.1 (1990).

that Mr. Janovec was not enrolled as a member of their tribes. Because the contracting officer was unable to verify that Mr. Janovec was enrolled as a member in any federally recognized Indian tribe, the contracting officer concluded that Tomahawk did not qualify as an eligible Indian economic enterprise for the purposes of this procurement, and rejected Tomahawk's bid.

Tomahawk protests the contracting officer's determination that Tomahawk is not an eligible Indian economic enterprise. The protester first argues that the documentation it submitted in response to the contracting officer's request establishes that Mr. Janovec is a lineal descendant of the Mdewakanton Sioux tribe, and was recognized as such by the BIA in determining that Mr. Janovec was entitled to a distribution of the tribe's judgment under the Act of October 25, 1972, and by the letters from the BIA's Aberdeen and Anadarko area offices, and the Heart of America Indian Center. The protester also contends that Mr. Janovec's Mdewakanton Sioux ancestry is sufficient to establish his "membership" in the Mdewakanton Sioux tribe, and therefore, Tomahawk's eligibility for award as a valid Indian economic enterprise.² In this regard, the protester notes that neither the Buy Indian Act, the BIAM, nor the terms of the IFB require that the majority owner of a firm, claiming to be Indian-owned and controlled, actually be "enrolled" as a member of a tribe, and argues that because of this, the agency acted improperly in rejecting Tomahawk's bid on the basis that Mr. Janovec is not "enrolled" as a member of any federally recognized Indian tribe.

The Buy Indian Act, 25 U.S.C. § 47, provides that:

"So far as may be practicable Indian labor shall be employed, and purchases of the products . . . of Indian industry may be made in open market in the discretion of the Secretary of the Interior."

²As mentioned previously, the IFB specifically contained the requirement that in order to be considered an eligible Indian economic enterprise, the majority owner must, among other things, be "a member of an Indian tribe." To the extent that Tomahawk is protesting the propriety of this requirement, and arguing that any particular degree of Indian ancestry should be sufficient to establish the majority owner's status as an Indian, regardless of membership in a tribe, its protest, filed after bid opening, is untimely. Protests based on alleged improprieties in a solicitation 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) (1993); Northwest Piping, Inc., B-232644, Jan. 23, 1989, 89-1 CPD ¶ 53.

The Secretary of the Interior, acting through the BIA Commissioner, has broad discretion and authority to implement this statute; defining the criteria a firm must meet to qualify as an Indian economic enterprise and the quantum of evidence required to establish compliance with the criteria falls within that broad discretion. White Buffalo Constr. Inc., 67 Comp. Gen. 206 (1988), 88-1 CPD ¶ 61; Northwest Piping, Inc., supra. Accordingly, we will disturb such decisions only where they are shown to be arbitrary, unreasonable, or in violation of law or regulation. Id. Tomahawk has made no such showing.

The agency does not dispute that Mr. Janovec is a lineal descendant of the Mdewakanton Sioux tribe with a Mdewakanton Sioux blood quantum of 3/32. Rather, the agency maintains that this fact is not, in and of itself, sufficient to establish that Mr. Janovec is an "Indian" for purposes of the Buy Indian Act because, as set forth in the IFB and BIAM, the majority owner of a firm must be "a member of an Indian tribe" in order for that individual to be considered an "Indian." In determining compliance with this requirement, the agency states that it simply "rel[ies] on each tribe to determine whether a given individual is a member." We find nothing improper in BIA's approach to determining whether the majority owner of a firm claiming to be Indian-owned and controlled is a member of an Indian tribe, and therefore an Indian, for purposes of determining eligibility for the award of a contract set aside for Indian economic enterprises.

Here, as stated above, the agency contacted the cognizant BIA office and tribal offices, and was informed that Mr. Janovec's name did not appear on the tribal membership roles and that the tribe thus does not consider Mr. Janovec to be a member. Further, as represented by the BIA, Mr. Janovec is not eligible for membership in the Mdewakanton Sioux tribe, despite his Mdewakanton Sioux ancestry, because he has a Mdewakanton Sioux blood quantum of only 3/32. The agency finally notes that Tomahawk has not, either with its bid or during the pendency of this protest, presented any document from the Mdewakanton Sioux tribe indicating that it considers Mr. Janovec a member of that tribe.³ Because the Mdewakanton Sioux do not consider Mr. Janovec to be a member of their tribe, and Mr. Janovec is apparently ineligible for membership because of his blood quantum, the agency's determination that Mr. Janovec is not a member of the Mdewakanton Sioux tribe, and thus not an Indian for the purposes of this procurement, was reasonable.

³The letter from the Heart of America Indian Center is not adequate evidence of tribal membership in the face of the tribe's denial.

To the extent that Tomahawk is arguing that the contracting officer's determination that Tomahawk does not qualify as eligible Indian economic enterprise is unreasonable because BIA's Aberdeen and Anadarko offices had previously determined that Tomahawk qualified as a potential Buy Indian concern, such a determination is not unreasonable solely because BIA offices differ as to the eligibility of the same firm for award of contracts set aside for Indian-owned and controlled concerns under different procurements or at different times. See Blaze Constr. Co., Inc., B-248008, June 17, 1992, 92-1 CPD ¶ 526; Calvin Corp., B-245768, Jan. 22, 1992, 92-1 CPD ¶ 98. Each federal procurement stands on its own; the BIA's determination as to "Buy Indian" eligibility may reasonably be different under the particular circumstances existing at the time or under a different procurement. Id.

In any event, the agency explains that for Buy Indian Act determinations made before 1988, BIA only used questionnaires to identify potential "Buy Indian" contractors, and that BIA's Aberdeen and Anadarko area offices considered Tomahawk a potential Buy Indian contractor "nearly ten years ago" apparently because of "a poorly monitored application process." The agency also points out that, regardless of the prior determinations, it has no record of ever awarding Tomahawk any contract set aside for Indian-owned concerns. Based on the foregoing, we find nothing in the prior determinations that casts doubt on the reasonableness of the contracting officer's determination here.

With regard to Mr. Janovec's receipt of a distribution of the settlement received by the Mdewakanton Sioux tribe under the Act of October 25, 1972, the agency points out that the sole criterion for entitlement to a portion of the distribution was being a descendant of Mdewakanton Sioux, rather than being a member of the Mdewakanton Sioux tribe. That is, the settlement criterion was clearly different than the "member of an Indian tribe" criterion set forth in the BIAM and the IFB for eligibility as an Indian economic enterprise. Thus, Mr. Janovec's receipt of a distribution under the Act of October 25, 1972, does not render unreasonable the agency's determination that Mr. Janovec is not an Indian for purposes of this procurement.

The protest is denied.

Robert P. Murphy
 ROA
 Robert P. Murphy
 Acting General Counsel