



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Cheyenne, Inc.

File: B-260328

Date: June 2, 1995

Anthony F. Little, Esq., Little and Stoof, for the protester.
Sherry Kinland Kaswell, Esq., Department of the Interior, for the agency.
Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest contending that awardee is incapable of successful performance due to its out-of-state location is dismissed since the challenged matter concerns the agency's affirmative determination of awardee's responsibility and the record does not show that this determination was made fraudulently or in bad faith, or that definitive responsibility criteria were not met.
2. Protest that awardee does not satisfy Buy Indian Act set-aside eligibility requirements is denied where majority of company stock is owned by certified Indian who--as the firm's president and chief executive officer--has pledged to devote 100 percent of her time to daily on-site management of contract performance.

DECISION

Cheyenne, Inc. protests the award of a contract to Records Conversion Services (RCS) under invitation for bids (IFB) No. BIA-M00-95-07, issued by the Bureau of Indian Affairs (BIA), Department of the Interior, for data preparation services at the BIA's Office of Information Resource Management, located in Albuquerque, New Mexico. Cheyenne contends that RCS is nonresponsible and that the firm is not an Indian economic enterprise, as required by the solicitation.

¹Cheyenne also protested the cancellation of the predecessor solicitation to this procurement; however, by decision dated February 22, 1995, we dismissed this portion of its protest as untimely since this ground of protest was filed more than
(continued...)

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We deny the protest.

BACKGROUND

The IFB was issued on September 20, 1994, as a total set-aside for Indian-owned-and-controlled enterprises pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1988). In order to be eligible for award, the IFB required firms to certify that (1) the enterprise is at least 51 percent owned by one or more individuals qualifying as Indians; (2) one or more of the Indian owners will be involved in the daily business management of the enterprise; and (3) the majority of the enterprise's earnings will accrue to the Indian owners. At the December 28 bid opening, RCS was the apparent low bidder; Cheyenne was the second-low bidder.

By letter dated December 29, the BIA asked RCS to complete and submit a "Preliminary Pre-Award Survey" which asked RCS to provide: an explanation of the contractor's proposed facility arrangements; a detailed itemization of RCS' bid price; a list of three federal agency contract references; a copy of the firm's articles of incorporation and shareholder's agreement; detailed stock information, including the type and number of shares owned by the owner; a written statement from the cognizant Indian tribe confirming RCS' Indian status; prior tax return information; and bank and credit references.

On January 13, 1995, after receiving RCS' December 30 pre-award survey submission response, representatives from the New Mexico BIA office visited RCS' main offices in Los Angeles, California and conducted a pre-award site survey of the firm. Because the site of contract performance for this requirement is Albuquerque, the BIA officials asked RCS how the California firm would perform at the New Mexico site. In response, RCS provided a list of three New Mexico realtors the firm had contacted and advised the BIA officials that these realtors had located various properties near the contract site which were available for immediate commercial lease in the event RCS won the contract award. RCS also advised the BIA that the firm's president--who was also the chief executive officer and owner of the majority

¹ (...continued)

10 days after Cheyenne received notice of the cancellation. See 4 C.F.R. § 21.2(a)(2) (1995).

of company stock--would relocate to New Mexico and devote 100 percent of her time to managing and supervising the New Mexico effort.

On January 24, after receiving confirmation--in the form of a tribal certificate--that RCS' president/chief executive officer was a registered member of the Middletown Rancheria Pomo Indian tribe, the BIA awarded the contract to RCS. On February 4, Cheyenne filed this protest, alleging that RCS is nonresponsible because it cannot perform this requirement due to its out-of-state location, and otherwise contending that RCS is not an Indian economic enterprise as required by the Buy Indian Act.

ANALYSIS

RCS' Capability to Perform

Cheyenne contends that because RCS is a California corporation which has never been registered--prior to this contract award--to conduct business in the state of New Mexico, the firm should have been found nonresponsible. In making this argument, Cheyenne contends that the agency made its affirmative determination that RCS was capable of successfully performing the contract in contravention of the following solicitation provisions, which Cheyenne interprets as requiring the successful contractor to be an in-state firm:

"The contractor is . . . required to perform these contract services from a location in the immediate Albuquerque, New Mexico [a]rea.

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"The [g]overnment will conduct site visits for purposes of evaluating the contractor's facilities prior to and after contract award for purposes of verifying contractor claims presented in the contractor's proposal(s)."

Under our Bid Protest Regulations, we will not review an agency's affirmative determination that a prospective contractor is responsible--that is, capable of successful contract performance--absent a showing of possible fraud or bad faith on the part of contracting officials, or that definitive responsibility criteria in the solicitation have not been met. 4 C.F.R. § 21.3(m)(5); Inframetrics, Inc., B-257400, Sept. 30, 1994, 94-2 CPD ¶ 138. In this case,

there is no evidence of fraud or bad faith on the part of the BIA. Further, the solicitation provisions on which Cheyenne relies do not constitute definitive responsibility criteria; that is, these clauses do not limit the class of eligible contractors for this requirement to those meeting specified qualitative and quantitative qualifications--such as unusual expertise or specialized facilities. See Tutor-Saliba Corp., Perini Corp., Buckley & Co., Inc., and O & G Indus., Inc., A Joint Venture, B-255756, Mar. 29, 1994, 94-1 CPD ¶ 223. Rather, these provisions merely place contractors on notice that the successful bidder must be capable of performing the required data preparation services from a location in Albuquerque, New Mexico, and that the agency will evaluate each bidder's capability to meet these terms of the IFB.

Under these circumstances, we have no basis for considering Cheyenne's challenge against the agency's determination that RCS is a responsible business concern. See Tutor-Saliba Corp., Perini Corp., Buckley & Co., Inc., and O & G Indus., Inc., A Joint Venture, B-255756.2, Apr. 20, 1994, 94-1 CPD ¶ 268.

Buy Indian Act Eligibility

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."

The Secretary of the Interior, acting through the BIA Commission, has broad discretionary authority to implement this statute; defining the criteria that a firm must meet to be eligible for award under a Buy Indian Act set-aside, and determining the quantum of evidence necessary to establish compliance with those criteria, falls within that broad discretion. Tomahawk Constr. Co., B-254938, Jan. 27, 1994, 94-1 CPD ¶ 48; Northwest Piping, Inc., B-232644, Jan. 23, 1989, 89-1 CPD ¶ 53. Consequently, we will only disturb a BIA conclusion regarding a firm's eligibility where it is shown to be arbitrary, unreasonable, or in violation of law or regulation. Id. Cheyenne has made no such showing.

The record shows that the BIA had persuasive evidence of RCS' Buy Indian Act eligibility. First, the company's current corporate stock statement (a public filing required by the State of California) as well as a Certified Public

Accountant's January 25, 1995, letter to the New Mexico BIA, identify Ms. Angelia Guadalupe as the majority shareholder, and confirm that this individual is the company president and chief executive officer of RCS. The firm's articles of incorporation further verify that in her role as president, Ms. Guadalupe holds "general supervision, direction and control of the business and Officers of the corporation."

Next, in addition to the Buy Indian Certification Statement submitted with the RCS bid, Ms. Guadalupe provided certification from the cognizant California BIA office that she is "1/4 degree Indian Blood of the Pomo tribe"; further, by letter dated December 28, 1994, the Middletown Rancheria Pomo Chairperson certified that Ms. Guadalupe is a lineal descendant and registered member of this federally recognized Indian tribe. Finally, Ms. Guadalupe--by letter dated January 18, 1995--verified that "[i]n the event RCS is awarded the contract, I intend to dedicate 100 [percent] of my time in managing the contract."

Certifications and determinations from the cognizant BIA office and tribal offices constitute reliable evidence from which to ascertain Buy Indian Act eligibility. See Tomahawk Constr. Co., supra; Blaze Constr. Co., Inc., B-248008, June 17, 1992, 92-1 CPD ¶ 526. Further, contemporaneous corporate documents--such as company by-laws and articles of incorporation--provide reliable sources for assessing whether a firm constitutes a bona fide Indian enterprise within the meaning of the Buy Indian Act. See Blaze Constr. Co., Inc., supra; Calvin Corp., B-245768, Jan. 22, 1992, 92-1 CPD ¶ 98. In this case, we think that based on the documentation gathered, and giving due weight to the representations of the California BIA and Middletown Rancheria Pomo tribe regarding RCS' Indian status, the BIA reasonably determined that RCS is an eligible Indian economic enterprise. While Cheyenne disagrees with the BIA's determination, it has not shown--nor does the record

suggest--that the information relied upon is inaccurate.² Under these circumstances, we find the BIA's determination that the awardee is an eligible Indian enterprise to be unobjectionable.

The protest is denied.

/s/ Michael R. Golden
for Robert P. Murphy
General Counsel

²Throughout its protest, Cheyenne argued that this Office should hold a hearing to "further the record" and to explore whether the New Mexico BIA "may have engaged in improper activities during the bid process." Absent evidence that a protest record is questionable or incomplete, this Office will not hold a bid protest hearing merely to permit the protester to orally reiterate its protest allegations or otherwise embark on a fishing expedition for additional grounds of protest. See Border Maintenance Serv., Inc.--Recon., 72 Comp. Gen. 265 (1993), 93-1 CPD ¶ 473. In this case, because there was no basis to question the credibility of any of the evidence submitted for the record, we denied Cheyenne's hearing request.