



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Navajo Security Company
File: B-260980; B-260981; B-260982
Date: July 17, 1995

Gaylon Yazzie for the protester.
Terrence J. Tychan and Mike Colvin, Department of Health and Human Services, for the agency.
Tania L. Calhoun, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that awardee does not satisfy Buy Indian Act set-aside eligibility requirements under Indian Health Service solicitation requiring the successful contractor to be 100-percent Indian-owned-and-controlled is denied where the documentation submitted to the agency by the awardee in support of its eligibility shows that all of the firm's outstanding stock is owned by a certified Indian; the firm's president, who acts as the operating and directing head of the corporation, is a certified Indian; and control of the firm is otherwise vested in a three-member board of directors, two of whom are certified Indians, which makes decisions based upon the votes of a majority of the members.

DECISION

Navajo Security Company protests the award of three contracts to Night Hawk Security, Inc./dba Spear Security, Inc. under invitation for bids (IFB) Nos. S95-0002CH, S95-0009CH, and S95-0010CH, issued as set-asides for Indian-owned-and-controlled concerns by the Indian Health Service (IHS), an agency within the Department of Health and Human Services, for guard services at healthcare facilities in Tsaile, Fort Defiance, and Chinle, Arizona, respectively. Navajo argues that Night Hawk is ineligible for award because it is not an Indian-owned-and-controlled concern.

We deny the protest with respect to IFB No. S95-0010CH, and we dismiss the protests with respect to the other two IFBs.¹

¹We dismiss Navajo's protests with respect to IFB Nos. S95-0002CH and S95-0009CH because the firm is not an interested party. Under our Bid Protest Regulations, a
(continued...)

064273/154886

BACKGROUND

The Navajo Area IHS issued these solicitations on December 12, 1994, as total set-asides for 100-percent Indian-owned-and-controlled concerns pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1988). Section M-2 of each solicitation required offerors not currently certified as Indian-owned-and-controlled concerns by IHS or the Bureau of Indian Affairs (BIA) to submit proof of ownership and eligibility for the Indian preference with their bids. Certified bidders were to enclose proof of certification with their bids if IHS had not granted the certification. The IFBs stated that bids received from non-Indian firms, or from firms without proof of ownership and eligibility, would be rejected.

Night Hawk submitted the apparent low bids under all three solicitations on January 12, 1995. Along with its bids, the firm submitted articles of incorporation naming Richard Brady, Robert Brady, and Jim Irvin to the board of directors and authorizing the issuance of 1,000 shares of "capital, no par, voting, common stock." Other corporate documents submitted name these individuals the sole officers of the corporation--president, vice-president and secretary, and treasurer, respectively--and offer them the 1,000 outstanding shares in approximately equal thirds. Night Hawk also submitted BIA certifications of Indian status for both Richard Brady and Robert Brady, and a Navajo Nation certificate of Navajo Indian blood for "Ervin James."

On January 19, Navajo filed an agency-level protest challenging, among other things, Night Hawk's eligibility for award under the Buy Indian Act and associated regulations.² In support of its contentions, the protester included a transcript of a telephone conversation purportedly between Navajo's representative and Jim Irvin,

¹(...continued)

protester is not an interested party where it would not be in line for award were its protest to be sustained. See 4 C.F.R. §§ 21.0(a), 21.1(a) (1995); ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7. Here, Navajo submitted the fifth- and fourth-low bids under these solicitations, respectively, and has not challenged the responsiveness of the intervening bids. As a result, even if we were to sustain Navajo's protests with respect to these solicitations, the intervening bidders, not Navajo, would be in line for award.

²Specifically, Navajo's agency-level protest questioned Jim Irvin's status within Night Hawk, and suggested that Irvin's ownership rendered the firm ineligible for award.

during which Jim Irvin indicated he was not associated with Night Hawk. The protest also included a copy of Night Hawk's annual report for the year ending December 31, 1993, filed with the Arizona Corporation Commission, which lists Richard Brady, Robert Brady, and James Irvin³ as the sole shareholders of record holding more than 20 percent of any class of shares issued by the corporation.

In a February 1 letter responding to the contracting officer's request for information concerning the Indian status of Jim Irvin, a Mr. Emerson Brady stated that Jim Irvin was not an owner of the firm, but an employee and member of the board. The record shows that Richard Brady met with the contracting officer on February 2 and informed the agency that Emerson Brady was the owner of the firm. This information was confirmed in a February 7 letter to the contracting officer which states that Emerson Brady is the sole owner of the firm, and that the firm had not previously disclosed his ownership because Emerson Brady was concerned that his work as a medicine man would "change to a certain degree" if this information were made public. Along with the letter, Night Hawk submitted a stock certificate dated January 1, 1994, which lists Emerson Brady as the owner of 1,000 shares of capital stock in Night Hawk. The letter stated that the certificate proved Emerson Brady's sole ownership of the firm, and explained that Richard Brady, Robert Brady, and Jim Irvin were listed on the corporate papers with voting stock only.

Pursuant to IHS guidelines, the question of Night Hawk's eligibility for award was referred to the agency's director of the division of contracts and grants policy, who determined that Night Hawk was 100-percent Indian-owned-and-controlled. Thus, IHS denied the protests and awarded the contracts to Night Hawk on March 24. Navajo subsequently filed these protests in our Office, contending that the documentation it submitted in its agency-level protest confirmed that Night Hawk did not qualify as an Indian-owned-and-controlled concern.⁴

ANALYSIS

³While this document refers to Mr. Irvin as "James," our decision conforms with the remainder of the documents in the record, which refer to him as "Jim."

⁴Although the agency was notified of the protests within 10 calendar days of award, it authorized performance of Night Hawk's contracts notwithstanding the protests, based upon its determination that performance was in the government's best interest. See 31 U.S.C. § 3553(d) (1988).

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 functions of the Secretary of the Interior for the maintenance and operation of hospital and health facilities for Indians were transferred to the Secretary of Health, Education and Welfare (now the Secretary of Health and Human Services). See 42 U.S.C. §§ 2001 et seq. (1982). Thus, the Secretary of Health and Human Services is authorized to use the Buy Indian Act in the acquisition of products of Indian industry in connection with the maintenance and operation of hospital and health facilities for Indians. This authority was delegated exclusively to IHS. 48 C.F.R. § PHS 380.501(b); see Department of Health and Human Servs.-- Advance Decision, B-232364, Oct. 5, 1988, 88-2 CPD ¶ 325.

Under the regulations governing IHS's use of the negotiating authority of the Buy Indian Act, an "Indian firm" is defined as:

". . . a sole enterprise, partnership, corporation, or other type of business organization owned, controlled, and operated by one or more Indians . . . or by an Indian firm; or a non-profit firm organized for the benefit of Indians and controlled by Indians." 48 C.F.R. § PHS 380.502-2.

IHS has broad discretionary authority to define the eligibility criteria for award under a Buy Indian Act set-aside, and to determine the amount of evidence required to establish compliance with those criteria. See White Buffalo Constr. Inc., 67 Comp. Gen. 206 (1988), 88-1 CPD ¶ 61; Cheyenne, Inc., B-260328, June 2, 1995, 95-1 CPD ¶ _____. Accordingly, we will disturb such decisions only where they are shown to be arbitrary, unreasonable, or in violation of law or regulation. Id.

IHS states that while the documents described above are inconsistent and much less clear than desired, they nonetheless support the agency's determination that Night Hawk is 100-percent Indian-owned-and-controlled. Our review of the record leads us to agree with the agency.

IHS determined that Night Hawk's documents show that Emerson Brady, whose Indian status is unchallenged, is the sole owner of Night Hawk. This determination is based upon the stock certificate submitted by the firm showing that, as of

January 1, 1994, Emerson Brady owned 1,000 shares of capital stock in Night Hawk.

In response to Navajo's protest, the agency now concedes that Jim Irvin is a non-Indian, and agrees that his ownership of any of the stock would render the firm ineligible for award because the applicable regulations require 100-percent Indian ownership. However, the agency explains that the February 7 letter states that Jim Irvin is not an owner of the company. Specifically,

"Attached to this letter is a copy of the stock certificate which [p]roves 100% per cent Ownership [by] Mr. Emerson C. Brady, CAPITAL STOCK, PAR VALUE. [Richard Brady], Robert Brady Jr. and Jim Irvin are listed on the Corporate Papers with voting stock only, NO PAR VALUE. Voting [s]tock was adopted to insure a proper and just decision could be made by Mr. Emerson C. Brady's Directors."

Although this document states that Richard Brady, Robert Brady, and Jim Irvin hold "voting stock" in the corporation, Night Hawk's corporate documents show that only 1,000 shares of stock were ever issued--to Emerson Brady--and not to the other individuals named in this letter. Since the record shows that only 1,000 shares of outstanding stock exist, and that Emerson Brady came into possession of all 1,000 of these shares on January 1, 1994,⁵ we will not overturn the agency's determination that the firm is 100-percent Indian-owned. Contemporaneous corporate documents--such as articles of incorporation and company by-laws--provide reliable sources for assessing whether a firm constitutes a bona fide Indian enterprise within the meaning of the Buy Indian Act. Cheyenne, Inc., supra; see Blaze Constr. Co., Inc., B-248008, June 17, 1992, 92-1 CPD ¶ 526.

The agency's concession that Jim Irvin is not an Indian also raises the question whether the firm is 100-percent Indian-controlled, as required by applicable regulations. As discussed above, the firm's corporate documents give the board of directors the authority to manage the business and affairs of the corporation, and Jim Irvin is one of three members of that board. However, Night Hawk's February 1 letter to the contracting officer states that Richard Brady,

⁵While the protester questions the legitimacy of Emerson Brady's January 1, 1994 stock certificate, we have no basis upon which to find it fraudulent. Further, since the firm's 1993 annual report was to reflect its status in that year, the fact that Emerson Brady is not listed as a stockholder in that report is consistent with this certificate.

whose Indian status is not in question, is the president of Night Hawk and runs the firm. This statement is confirmed by the firm's corporate documents, wherein the president is empowered to act as the operating and directing head of the corporation. Richard Brady also states, and the corporate documents confirm, that his decisions can be overridden only if both other members of the board vote against him, and that only one of these members, Jim Irvin, is a non-Indian.⁶ Moreover, the corporate documents show that while Jim Irvin, as the firm's treasurer, is entrusted with the general custody of the corporation's funds and securities and responsible for bookkeeping and financial reports, he is not given any powers of day-to-day control such as those given to the president and vice-president. On the basis of the record before us, we conclude that the agency reasonably determined that the firm is 100-percent Indian-owned-and-controlled.

The protest with respect to IFB No. S95-0010CH is denied; the protests with respect to IFB Nos. S95-0002CH and S95-0009CH are dismissed.

Christine S. Melody
for Robert P. Murphy
General Counsel

⁶The Indian status of Robert Brady is not in question.