



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Indian Affiliates, Inc.

File: B-243420

Date: August 1, 1991

Frank Talker for the protester,
Justin P. Patterson, Esq., and Sherry K. Kaswell, Esq.,
Department of the Interior, for the agency.
Paula A. Williams, Esq., and Paul Lieberman, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Protest that firm was improperly eliminated from consideration in acquisition for architect-engineer services is denied where record shows that the selection decision was reasonable and consistent with the announced evaluation criteria and protester's elimination was based on its low relative standing among the firms responding to the Commerce Business Daily announcement.

2. Allegation that requirement for particular design experience is unduly restrictive of competition is dismissed as untimely when first raised after the date for receipt of submittals since this protest ground is based on an alleged apparent impropriety.

3. Allegation of bad faith on the part of contracting officials due to alleged undue influence by third parties is denied where protester has provided no credible evidence in support of its assertion.

DECISION

Indian Affiliates, Inc. (IAI) protests the Department of the Interior, Bureau of Indian Affairs' (BIA), selection of Cooper Consultants, Inc. as the firm with which to negotiate an architect-engineer (A-E) contract for design and engineering services for juvenile detention centers located on the Navajo Nation Indian Reservation in Chinle and Tuba City, Arizona, respectively. Both projects were set aside for Indian-owned and controlled firms pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1988). IAI alleges that its submittals were improperly evaluated and, as a result, eliminated from consideration for

the two projects, and that BIA procurement officials were unduly influenced by tribal politicians against IAI.

We deny the protest in part and dismiss it in part.

The two projects were advertised in the Commerce Business Daily (CBD) on October 30, 1990, pursuant to the selection procedures set out in the Brooks Act, as amended, 40 U.S.C.A. §§ 541 et seq. (West Supp. 1989), and its implementing regulations, Federal Acquisition Regulation (FAR) part 36.6, which govern the procurement of A-E design services. Under these procedures, the contracting agency must publicly announce the requirements and evaluation criteria for the A-E services. An A-E evaluation board established by the agency evaluates the A-E performance data and statements of qualifications already on file, as well as those submitted in response to the announcement of the particular project, and selects at least three firms for discussions. The board recommends to the selection official, in order of preference, no less than three firms deemed most highly qualified. The selection official then lists, in order of preference, the firm most qualified to perform the required work. Negotiations are held with the firm ranked first; if the agency is unable to agree with the firm as to a reasonable fee, negotiations are terminated and the second ranked firm is invited to submit its proposed fee. Vertrans Design Assocs., B-242080, Mar. 8, 1991, 91-1 CPD ¶ 265.

The project descriptions set forth in the CBD announcements called for complete A-E design services for law enforcement facilities to be located on Indian reservations in Chinle and Tuba City, with both detention facilities to be designed under the Planning of New Institutions (PONI)^{1/} program. The announcements indicated the following evaluation criteria and percentage points would be used in evaluating the A-E firms submittals: (1) professional qualification, 30 percent; (2) personnel experience, 25 percent; (3) firm's experience, 20 percent; (4) tribal experience, 5 percent; (5) geographic location, 5 percent; and (6) Indian preference compliance, 15 percent. The CBD announcements further indicated that within the professional qualification category, greater value would be given to Indian-owned firms whose owners were registered or licensed A-E professionals. Also, within the firm's experience category, the CBD announcements provided that evaluation under this criteria would include the firm's

^{1/} PONI is a planning and assessment process used, as adopted and modified by the BIA Division of Law Enforcement Services, for all new juvenile detention project designs and renovations.

experience in using the PONI design program. The announcements established a deadline of November 29, for receipt of Standard Form (SF) 254, Architect-Engineer and Related Services Questionnaire, and SF 255, Architect-Engineer and Related Services for Specific Project.

Eleven Indian-owned A-E firms responded to the announcement for the Chinle project and 12 Indian-owned firms responded for the Tuba City project. The evaluation board evaluated all the SFs 254 and 255 submittals for both projects and ranked the firms according to the evaluation criteria established in the announcements. The three highest ranked A-E firms for each project^{2/} were selected for interviews following which the board recommended the three most qualified firms for negotiations with Cooper Consultants ranked first for each project.

By letter dated February 1, 1991, IAI filed an agency-level protest objecting to BIA's failure to choose IAI as one of the three highest-rated firms. In its protest, IAI alleged that as the only Navajo Indian firm which has provided the type design services called for in the announcements, it was unfairly eliminated from the competition. BIA denied the agency-level protest on the grounds that IAI's elimination was based on its low relative standing among the firms responding to the announcements. The agency explained that Cooper Consultants and two other Indian-owned firms received a higher overall score than IAI, especially in the areas of professional qualification, personnel experience, and company experience. This protest followed.

IAI continues to challenge the evaluation of its submittals and those of Cooper Consultants for these two projects. The protester now also asserts that the actions taken by BIA may have been the result of undue influence exerted by Navajo tribal officials.

In reviewing protests concerning the selection of an A-E contractor, we will examine whether that selection is reasonable. Harding Lawson Assocs., Inc., B-230219, May 20, 1988, 88-1 CPD ¶ 493. It is not the function of this Office to make our own determination of the relative merits of the submissions of A-E firms. The procuring officials enjoy a reasonable degree discretion in evaluating such submissions and we will not substitute our judgment for that of the procuring agency by conducting an independent examination. Vertrans Design Assocs., B-242080, supra. From our review of

^{2/} IAI was ranked 9th for the Chinle project and 11th for the Tuba City project.

the evaluation record, we conclude that the selection decision is supported by the record and it is reasonable.

With regard to professional qualifications, the most important criteria, the record shows that Cooper Consultants received a high score because its owner is a registered civil engineer. IAI did not receive a high score under this criteria substantially because the firm is not owned by a licensed Indian architect or engineer. This is consistent with the announced criteria which provide that greater value shall be given to Indian-owned firms which have owner(s) who are registered or licensed professionals in the field of architecture or engineering. While the protester is correct that A-E firms responding to the announcements need not be owned by a licensed or registered architect or engineer, the announced criteria explicitly provide that A-E firms whose owners are Indian and are licensed/registered in either discipline will receive a higher rating than those such as IAI which do not meet this standard. We have no basis to conclude that IAI's rating under this criteria was improper.

As to personnel experience, which was ranked second in importance, IAI asserts that the evaluators failed to consider the information furnished in IAI's submittals that its staff of architects and engineers have designed several detention facilities and jails for both juveniles and adults. In fact, IAI's submittals, its SFs 254 and 255, are lacking in detail, and, in particular, provide little evidence that its key personnel have substantial experience in the design of detention facilities. IAI identified only one adult detention facility for which the firm was the prime contractor for design; IAI's SF 254 listed a staff of two architects but no engineers; IAI did not identify the architects responsible for design, project management, and project documents production. Unlike IAI, Cooper Consultants and other competing A-E firms also enhanced their professional capabilities through joint venture arrangements with other A-E firms. Although IAI has questioned this type of arrangement, they are permissible under the requirement set forth for this procurement. Thus, IAI's relatively low score under this criteria properly reflects IAI's failure to identify key employees or to indicate performance of the kind of design projects which could have improved its qualifications under this criteria.


With regard to firm's experience, IAI was properly rated low because its submittals provided no evidence that the firm had previously utilized PONI in the development of design and construction documents. IAI acknowledges that it lacks PONI experience, but contends that this requirement is used by BIA to eliminate Indian firms, such as itself, from consideration for design contracts. To the extent that IAI takes issue with the requirement, this aspect of its protest is untimely. As

noted above, the announcements specifically stated that both detention centers' designs were to be based on the PONI program, and provided for the evaluation of offerors' experience in using this program. If IAI believed that this requirement is unduly restrictive, it was required to file its protest prior to November 29--the date for receipt of responses--since this protest ground is based on an alleged impropriety apparent from the announcements. 4 C.F.R. § 21.2(a)(1) (1991). Since IAI did not do so, the issue is untimely and will not be considered. See Fire Protection & Code Consultants, Inc., B-243070, Mar. 7, 1991, 91-1 CPD ¶ 259; Herndon & Thompson, B-240748, Oct. 24, 1990, 90-2 CPD ¶ 327.

Finally, IAI's allegation of bad faith on the part of contracting officials resulting from alleged undue influence by officials of the previous Navajo Nation tribal administration is without merit. To establish bad faith, the protester must submit convincing proof that contracting officials intended to harm the protester, since contracting officials are presumed to act in good faith. See Vicor Assocs., Inc., B-241496.2, Mar. 13, 1991, 91-1 CPD ¶ 278. While the protester has provided a number of anecdotes about the behavior of certain tribal officials, it has offered no credible evidence to support the claim of bad faith on the part of contracting officials. Further, the kinds of action to which IAI points, such as the agency's statement that IAI's protest had delayed the project, do not provide any evidence of bad faith. Rather, the record shows that IAI's low rating was directly related to its deficiencies under the three most important evaluation criteria.

To the extent that IAI protests Cooper Consultants' evaluation, it is not an interested party to raise this issue since IAI, as the ninth rated offeror, would not be in line for award even if it were correct that Cooper Consultants received a higher rating than it deserved. 4 C.F.R. § 21.0(a); Arthur Cotton Moore/Assocs., P.C., B-234302, Mar. 9, 1989, 89-1 CPD ¶ 260.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel