



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Peterson-Nunez Joint Venture

**File:** B-258788

**Date:** February 13, 1995

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Elena G. Nunez and Richard E. Peterson for the protester.  
Sherry Kinland Kaswell, Esq., and Justin P. Fatterson, Esq., Department of the Interior, for the agency.  
Jacqueline Maeder, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Agency reasonably canceled request for proposals after submission and evaluation of initial offers where the solicitation was materially defective and the agency may no longer require the solicited services.

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### DECISION

Peterson-Nunez Joint Venture protests the cancellation of request for proposals (RFP) No. C50-94-2757, issued by the Bureau of Indian Affairs (BIA), Department of the Interior for an audit of the Fort Peck Irrigation Project, Billings, Montana. Peterson-Nunez contends that the RFP was canceled for improper reasons.

We deny the protest.

The RFP was issued as a total set-aside for Indian-owned and controlled concerns pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1988). To qualify as an eligible Indian economic enterprise, a joint venture is required to be at least 51 percent Indian-owned and controlled, and 51 percent of the profits must accrue to the Indian partner. The RFP stated that these requirements must exist when an offer is made, at the time of award, and during the term of the contract.

Four proposals, including one from Peterson-Nunez, comprised of Peterson & Associates, an Indian-owned firm, and Nunez & Associates, a firm which is not Indian-owned, were received by the closing date. The evaluators reviewing the proposals concluded that Peterson-Nunez appeared to be in line for award based on technical merit and price. By letter dated August 31, the contract specialist

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requested that Peterson-Nunez submit documents to substantiate the joint venture's Indian ownership and management, including a copy of their joint venture agreement and a certification of Indian blood for Richard E. Peterson. Because the contract specialist believed that funds for this project had to be obligated by September 16, she requested a prompt reply.

Although additional submissions were received from Peterson-Nunez on September 2, 8, and 12, the agency could not determine if the joint venture was 51 percent Indian-owned and controlled. The contract specialist also believed that the solicitation was defective because it did not include a source selection plan. Finally, the contract specialist was advised by the Chief of BIA's Branch of Water Resources, that "none of the proposals submitted were worth the dollar amount proposed." Based on these circumstances, BIA determined that cancellation of the solicitation was in the government's best interests and on September 15, the agency canceled the solicitation.

The protester maintains that BIA canceled the solicitation--after finding Peterson-Nunez the likely awardee--in order to circumvent an award to Peterson-Nunez. The protester alleges that the supervisory contract specialist (the supervisor) in the Billings office, who the protester asserts is the person responsible for the procurement, has a conflict of interest and should not have participated in the procurement process. Peterson-Nunez alleges that the supervisor had "pre-selected" another firm for award before issuing the solicitation and, when the supervisor discovered that he could not award to that firm because Peterson-Nunez was determined by the evaluators to be in line for award, he canceled the solicitation.

While the agency states that a contract specialist in the Billings office was responsible for this solicitation and that the supervisor, by letter dated August 11, recused himself because his daughter is employed by a firm which submitted a proposal under the solicitation, the protester argues that the agency's attempts to distance the supervisor from the procurement are not consistent with the facts. For instance, the protester argues that the supervisor, among other things, indicated to the joint venture that he was in charge of the procurement, repeatedly responded to the protester's questions about the procurement, stated that he would determine if the joint venture requirements were met, and indicated to the protester that "he" had canceled the solicitation. In addition, the protester argues that the supervisor, or others within the procurement office, divulged procurement sensitive information to a competitor.

BIA originally argued that the cancellation was proper because the protester failed to supply required documentation regarding its joint venture agreement before the date by which fiscal year funds needed to be obligated. Additionally, the agency argued that the cancellation was justified by the failure to include a source selection plan and by "the end-user's view that the information to be provided under the proposals was not worth the cost."

In response to inquiries by our Office, BIA withdrew some of these originally asserted reasons for the cancellation and modified others. Specifically, the agency has now advised our Office that the funds allocated for this procurement are "no year" funds and that failure to obligate the funds by September 16 merely meant that the contract could not be awarded during fiscal year 1994; the funds, however, were available the next fiscal year. The agency also advised our Office that it has no documentation to support the statement that none of the proposals was worth the cost and conceded that this unofficial, informal statement by the head of the office whose project was to be audited provided no grounds for the cancellation.

The agency also concedes that the lack of a source selection plan in the solicitation did not necessitate cancellation since such plans are not typically part of the solicitation but are internal agency documents outlining proposal evaluation procedures. However, the agency now argues that the lack of a source selection plan affected the validity of the evaluation. In this respect, because there was no source selection plan, the agency states that the evaluators did not have the necessary guidance to perform an acceptable evaluation. Indeed, the agency states that the contract specialist "literally just handed [the evaluators] the solicitation and the technical proposals." According to the agency, the contract specialist, because of the press of end-of-year business, was unable to provide any guidance to the evaluators, and the evaluations were incomplete, consisting only of numerical scores with no narratives to support the scoring.

In addition, the agency argues that the solicitation was defective because it did not include the clause at Federal Acquisition Regulation (FAR) § 52.215-16, reserving the right to award a contract based on initial offers. The agency contends that without this clause in the solicitation, it would be improper to award to Peterson-Nunez without first establishing a competitive range and holding discussions and requesting and evaluating best and final offers (BAFO) from competitive range offerors. The agency also argues that a number of provisions included in the RFP, for example, FAR § 52.214-4, False Statements in Bids and FAR § 52.214-5, Submission of Bids, apply to sealed bid procurements, rather than, as here, a negotiated procurement. BIA also continues to argue that based on the documents submitted, it could not determine if Peterson-Nunez met the requirement of being 51 percent Indian-owned and controlled.

Finally, BIA states that the agency is considering whether to resolicit for this project or instead to solicit for auditing services for another project. BIA explained that the procurement was undertaken as a result of a 1989 Inspector General's report which found that BIA was not recovering money which was due from irrigation projects. BIA reviewed several irrigation projects and decided to contract out the auditing of one project. BIA's Irrigation and Power Liaison Compliance Section, Branch of Irrigation and Power decided to contract out an audit of the Fort Peck Irrigation Project, with the award to be handled by the Billings area office. The Billings office has questioned the need for the external audit of the Fort Peck

project, asserting that if any external audit is done, it should be of a different project because the Billings personnel feel that the accounting system on that project is more problematic and the collections situation is more complex. BIA explains that the Power Liaison Compliance Section apparently feels that an external audit is necessary but is amenable to switching the audit site to the other project if Billings recommends and supports such a recommendation. Currently, no recommendation has been submitted.

In a negotiated procurement such as this one, the contracting activity has broad authority to decide whether to cancel a solicitation and need only establish a reasonable basis for the cancellation. Brackett Aircraft Radio Co., B-246282, Jan. 8, 1992, 92-1 CPD ¶ 43. It is the responsibility of the contracting activity to determine its requirements, and our Office will defer to the activity's judgment in that regard. Research Analysis and Maintenance, Inc., B-236575, Dec. 12, 1989, 89-2 CPD ¶ 543. The fact that in this case the cancellation occurred after Peterson-Nunez had been identified as the likely awardee does not by itself evidence that the cancellation was improper; an agency may properly cancel a solicitation no matter when the information precipitating the cancellation first surfaces or should have been known, even if the solicitation is not canceled until after proposals have been submitted and evaluated and protesters have incurred costs in pursuing the award, or until after a protest has been filed. PAI Corp. et al., B-244287.5, et al., Nov. 29, 1991, 91-2 CPD ¶ 508.

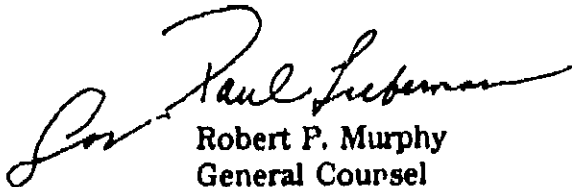
We conclude that the cancellation was justified. First, the failure to include in the RFP the FAR § 52.215-16 clause was a material flaw that justified canceling the RFP. Under FAR § 15.610(a)(3), a procuring agency may not award a contract on the basis of initial proposals unless, among other things, "[t]he solicitation notified all offerors of the possibility that award might be made without discussions . . ." Since the RFP here did not include the FAR § 52.215-16 clause, and did not otherwise reserve the right to award on the basis of initial proposals, that option was not available to BIA. In other words, the agency is correct that it would have been improper to award to Peterson-Nunez, or any other offeror, without first establishing a competitive range, holding discussions, and requesting and evaluating BAFOs from competitive range offerors. Where an agency intends to make award on the basis of initial proposals, the absence of this clause, or similar language reserving the right to award on the basis of initial proposals, is a solicitation flaw that can be corrected by canceling and resoliciting.

The cancellation is also justified by the possibility that the agency may not need the solicited services. As explained above, BIA reports that the Billings office was not certain that it had a need to audit the Fort Peck Irrigation Project and that the agency is reassessing the need for the Fort Peck audit. Cancellation is appropriate when an agency determines that it no longer has a requirement for the item solicited. California Inflatables Co., Inc., B-241729, Feb. 6, 1991, 91-1 CPD ¶ 133. A reassessment which suggests that a solicitation misstates the agency's needs may

form the basis for canceling that solicitation, even when the only change that has occurred is the fact of the reassessment. Dr. Robert J. Telenak, B-247681, June 29, 1992, 92-2 CPD ¶ 4. This is true even where, as here, the outlook is uncertain at the time of the reassessment, so that the agency is not sure, at the time of cancellation, whether the requirement will exist later. *Id.*<sup>1</sup>

Finally, the protester objects to BIA's late justification for the cancellation, arguing that, although the agency is now asserting new reasons for canceling the project, it did not provide these reasons in September, when the RFP was canceled. Even though BIA asserted additional reasons to justify the cancellation during the development of the protest, these reasons can be used to justify the cancellation so long as they would have been proper support for the determination to cancel at the time that decision was made. AWD Mehle GmbH-Recon., B-225579.2, June 11, 1987, 87-1 CPD ¶ 584.

Accordingly, the protest is denied.

  
Robert P. Murphy  
General Counsel

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<sup>1</sup>Peterson-Nunez makes serious allegations concerning a conflict of interest and the improper release of procurement sensitive information; however, we have no reason to address these issues since there were reasonable grounds for the cancellation. If BIA decides to resolicit for the services, or to solicit similar services for a different project, we expect that the agency will consider whether the procurement should be managed by other agency officials.