



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.  
Washington, DC 20548

Comptroller General  
of the United States

# Decision

## DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

**Matter of:** Kimo Constructors Inc.

**File:** B-416162; B-416163; B-416164

**Date:** April 23, 2018

Pete V. Domenici, Jr., Esq., and Reed C. Easterwood, Esq., Domenici Law Firm, P.C., for the protester.

Lindsay J. Stoudt, Esq., and Hillary J. Freund, Esq., Department of Homeland Security, for the agency.

Charmaine A. Stevenson, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

Protests challenging contract awards by a federally recognized tribe are dismissed because this entity is not a federal agency as defined by the Federal Property and Administrative Services Act of 1949 and therefore the challenged actions are not matters over which GAO has bid protest jurisdiction.

## DECISION

Kimo Constructors, Inc., a Native American and veteran-owned business of Bosque Farms, New Mexico, protests its non-selection for award under requests for proposal (RFP) Nos. FEMA-4152-PW506, FEMA-4197-PW45, and FEMA-4148-PW186, issued by Santo Domingo Pueblo for sediment removal and backfill material replacement. The protester alleges that Santo Domingo Pueblo performed unreasonable technical and price evaluations that resulted in flawed selection decisions, and inadequately documented the record.

We dismiss the protests.

## BACKGROUND

Santo Domingo Pueblo is a federally recognized tribe.<sup>1</sup> 83 Fed. Reg. 4235, 4237 (Jan. 30, 2018). Using grant funding from the Department of Homeland Security, Federal

<sup>1</sup> The tribe is also known as Kewa Pueblo. 83 Fed. Reg. 4235, 4237 (Jan. 30, 2018).

Emergency Management Agency (FEMA), Santo Domingo Pueblo sought competitive proposals for public works projects through its prime contractor and construction manager, High Water Mark, LLC, of Bernalillo, New Mexico, including the RFPs at issue in these protests. See Protest, Exh. 5, RFP, at 2 (“The Santo Domingo Pueblo requests proposals with the intent of awarding a contract for FEMA Projects Group 1.”). Proposals were to be evaluated “[p]er the Santo Domingo Pueblo Procurement Policy.” Protest, Exh. 3, RFP, at 2.

Kimo submitted its proposals to the Santo Domingo Pueblo in December 2017. Protest at 2. On March 7, 2018, the protester was advised by the Santo Domingo Pueblo FEMA Project Manager that its proposals responding to the RFPs had not been selected for award. Protest, Exh. 1, Letters of Non-Selection, Mar. 7, 2018. These protests followed.

## DISCUSSION

The protester argues that although the Santo Domingo Pueblo is a “non-federal entity”<sup>2</sup> under FEMA procurement guidance and regulations, our Office has discretion to hear the protests because they relate to matters that are primarily of federal concern including allegations of violations of binding procurement standards, impropriety, waste, and abuse. Response to Request for Dismissal at 2; see also Protest at 2. The protester cites to Office of Management and Budget guidance for grants and agreements at 2 C.F.R. part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards as support, arguing that Santo Domingo Pueblo must adhere to federal regulations when conducting procurements under federal grants. Id. at 5.

The agency argues that our Office lacks jurisdiction over the matter because Santo Domingo Pueblo is not a federal agency. Request for Dismissal at 2. The agency argues that the protester has admitted that the tribe is a non-federal entity, and therefore the protest should be dismissed.

The statutory authority of this Office to decide bid protests of procurement actions is set forth in the Competition in Contracting Act of 1984 (CICA). 31 U.S.C. §§ 3551-3556. Since the passage of CICA, our jurisdiction has not been based on the expenditure of appropriated funds; instead we look to our statutory charge to decide procurement protests involving federal agencies. Information Experts, Inc., B-413887, B-413887.2, Dec. 30, 2016, 2017 CPD ¶ 16 at 5. Specifically, CICA defines a protest as a written objection by an interested party to a solicitation or other request by a federal agency for

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<sup>2</sup> According to the protester, the tribe is a non-federal entity pursuant to 2 C.F.R. part 200. Protest at 2. This means the tribe is “a state, local government, Indian tribe, institution of higher education (IHE), or nonprofit organization that carries out a Federal award as a recipient or subrecipient.” 2 C.F.R. § 200.69.

offers for a contract for the procurement of property or services, or an award or proposed award of such a contract. 31 U.S.C. § 3551(1). CICA adopted the definition of a federal agency set forth in section 3 of the Federal Property and Administrative Services Act of 1949 (FPASA), 40 U.S.C. § 102. See 31 U.S.C. § 3551(3). FPASA defines a federal agency as “an executive agency or an establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol, and any activities under the direction of the Architect of the Capitol).” 40 U.S.C. § 102(5). Accordingly, our threshold jurisdictional concern is whether the procurement at issue is being conducted by a federal agency. S.E. James & Co., B-415733, Feb. 7, 2018 CPD ¶ 69 at 2.

Here, the record shows that the RFPs were issued by the Santo Domingo Pueblo. See Protest, Exh. 5, RFP, at 2 (“The Santo Domingo Pueblo requests proposals with the intent of awarding a contract for FEMA Projects Group 1.”). Kimo submitted its proposals to the Santo Domingo Pueblo and was advised by the Santo Domingo Pueblo FEMA Project Manager that its proposals responding to the RFPs had not been selected for award. As noted, our jurisdiction is limited to procurements of federal agencies. The Santo Domingo Pueblo is not a federal agency as defined by CICA. Accordingly, since the procuring entity here is not a federal agency, we are without jurisdiction to consider the protests.

The protests are dismissed.

Thomas H. Armstrong  
General Counsel