Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Young & Joe Construction

File: B-275043

Date: January 16, 1997

Robert O. Dyer, Esq., Jennings & Haug, for the protester.
Sherry Kinland Kaswell, Esq., and Justin P. Patterson, Esq., Department of the Interior, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where agency fails to demonstrate reasonable basis for its determination that firm which self-certified as an Indian economic enterprise was not in fact such.

DECISION

Young & Joe Construction protests the rejection of its bid and the award of a contract to Blaze Construction under invitation for bids (IFB) No. SB-96-0016, issued by the Department of the Interior, Bureau of Indian Affairs (BIA), for road construction on the Salt River Indian Reservation, Arizona. The procurement was set aside for eligible Indian economic enterprises pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1994). Young & Joe's bid was rejected based on the contracting officer's determination that it was not an eligible Indian economic enterprise. Young & Joe disputes that determination.

We sustain the protest.

BACKGROUND

The IFB was issued on June 20, 1996, as a total Buy Indian set-aside. To be considered for award, bidding enterprises were required to certify that they were at least 51 percent Indian-owned, that one or more of the Indian owners would be involved in daily business management of the enterprise, and that the majority of the enterprise's earnings would accrue to the Indian owners. At the July 31 bid opening, Young & Joe, a partnership comprised of Young & Joe Management Company, an Indian-owned firm (holding a majority interest), and Agate, Inc., a non-Indian firm (holding a minority interest), was the low bidder; Blaze was second

low. As required, Young & Joe certified in its bid that it was an eligible Indian economic enterprise.

By letter dated August 1, the contracting officer asked Young & Joe to submit information required to establish its responsibility, including its latest financial statements; a list of its past road construction experience; and evidence that it had the necessary production, construction, and technical equipment and facilities, or ability to obtain them. In an August 5 telephone conversation, the contracting officer also requested a copy of Young & Joe's partnership agreement. Young & Joe submitted the requested information the following week.

After reviewing the information submitted, the contracting officer determined that Young & Joe was acting as a front for Agate and did not qualify as an eligible Indian-owned economic enterprise. She based this determination on her observations that (1) the financial resources of both the partnership and its Indian owners were limited, meaning that the partnership would be dependent on Agate for the cash to finance performance; (2) it was not clear that the Indian owners would manage the day to day business of the partnership or be involved in management of this particular project;(3) the construction experience of both Young & Joe as a company and of its Indian owners was limited; and (4) Agate would provide the principal place of business and equipment for the project. On September 27, the agency notified Young & Joe that its bid had been rejected. A contract was awarded to Blaze on the same date.

ANALYSIS

Young & Joe challenges the agency's determination, arguing that the contracting officer lacked a reasonable basis for concluding that it does not qualify as an eligible Indian economic enterprise.

The Secretary of the Interior, acting through the BIA Commissioner, has broad discretionary authority to implement the Buy Indian Act; defining the criteria a firm must meet to qualify as an Indian economic enterprise; and determining the quantum of evidence necessary to establish compliance with the required criteria falls within that broad discretion. Cheyenne, Inc., B-260328, June 2, 1995, 95-2 CPD ¶ 117; Arrowhead Constr., Inc./FNF Constr., Inc., B-251707; B-251708, Apr. 19, 1993, 93-1 CPD ¶ 334. Consequently, we will defer to the BIA's judgments regarding the status of firms as eligible Indian economic enterprises, unless such judgments are shown to be unreasonable. Calvin Corp., B-245768, Jan. 22, 1992, 92-1 CPD ¶ 98. Here, we think that the protester has made such a showing.

First, with regard to the issue of financial resources, it is not apparent from the record that Young & Joe will be totally dependent on Agate for funding, as the contracting officer surmises. The record reflects that the partnership has qualified

for its own line of credit at a local bank and that it obtained its own bond for this project.[1] Further, pursuant to the terms of the partnership agreement, Young & Joe Management Company will maintain majority ownership of the partnership and receive a majority of the profits even in the event that Agate contributes a majority of the cash for performance. In this regard, the partnership agreement clearly states that Agate will own a 33-1/3 percent, and Young & Joe Management Company a 66 2/3-percent, interest in the partnership, and that profits, losses, gain, and distributions will be borne in the same percentages. Although, as the contracting officer points out, the partnership agreement also provides for loans by either partner to the partnership, which must be repaid with interest prior to a distribution of profits to the partners, we fail to see how this leads to the conclusion reached by the contracting officer that a majority of any profits will accrue to Agate: Agate will not increase its percentage of ownership in the partnership by loaning it money.

Second, we see no reasonable basis for the contracting officer's conclusion that Young & Joe's Indian owners will not be involved in daily business management of the enterprise. The partnership agreement designates Young & Joe Management Company as the partnership's initial managing partner, and there is no evidence in the record that this designation has ever been changed.[2] Further, contrary to the contention of the contracting officer, the partnership agreement does not require unanimous approval of the partners for certain business decisions--an initial requirement for unanimous approval of the partners was changed to a requirement for the managing partner's approval by the Second Amendment to the Partnership Agreement, dated April 22, 1996.[3]

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[1]There is also no evidence in the record to substantiate the contracting officer's conjecture that Agate obtained either bonding or insurance on behalf of the partnership.

[2]The agency argues that the fact that the designation is identified as "initial" means that it is subject to change. We agree that the designation is subject to change, but absent any evidence that it has in fact been changed, we see no basis to conclude that Young & Joe Management Company is no longer the managing partner of the partnership. Also, since the partnership, like any partnership, would be free to change the designation of managing partner through amendment of the partnership agreement, we fail to see how the inclusion of the word "initial" makes the arrangement any more subject to change than it would otherwise be.

[3]The agency argues that the contracting officer did not have a copy of the Second Amendment at the time she made her eligibility determination and therefore could not consider it. The contracting officer admits in her affidavit that she was informed of the existence of the amendment prior to making her eligibility

(continued...)

Third, we see no reasonable basis for the contracting officer's conclusion that neither of the Indian owners of Young & Joe Management Company will be involved in management of the road project here. In response to the agency's inquiry, Young & Joe identified one of the Indian owners, Charles Young, as the project's manager. The contracting officer refused to accept this representation based on her judgment that Mr. Young did not have sufficient construction-related experience to be capable of performing that function. The record does not support the contracting officer's conclusion that Mr. Young is not qualified, and therefore could not be intending to serve as project manager, given that his resume indicates that he has a range of construction-related experience, including involvement in highway construction projects. In addition, Mr. Young is the qualifying party for the partnership's Class A General Engineering license, the license necessary for the subject project. In order to qualify for this license, Mr. Young was required to demonstrate, by written examination, qualification in the kind of work for which his company proposes to contract; general knowledge of the building, safety, health, and lien laws of the state of Arizona, administrative principles of the contracting business, and the rules adopted by the Registrar of Contractors; and knowledge and understanding of the construction plans and specifications applicable to the particular industry in which his company proposes to engage. Given Mr. Young's demonstrated qualifications, we do not think that the contracting officer had a reasonable basis for discounting Young & Joe's representation that he would manage the subject road construction project.[4] We also do not think that the fact that Mr. Young has a part-time (i.e., 20 hours per week) job at a feed store furnished the contracting officer with a reasonable basis to doubt that he would be available to perform his responsibilities as project manager. Based on the information available in the record, we see no reason why he could not perform both functions.

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[3](...continued)
determination, however; it is unclear why, once on notice, she took no steps to obtain a copy.

[4]We recognize that the contracting officer may not have been aware that Mr. Young had replaced Agate as the qualifying party on the partnership's engineering license since there is no evidence in the record that this information was submitted to the agency. We do not think that the protester can be faulted for failing to submit all documentation bearing on its status as an eligible Indian economic enterprise, however, since the contracting officer failed to inform it (until immediately prior to issuance of her notice rejecting its bid) that she questioned the validity of its self-certification.

Further, the record does not support the contracting officer's conclusion that Young & Joe Construction, as a company, has no construction experience. Although Young & Joe did state on its Experience Questionnaire that it had been in existence only 1 year and had not yet completed any projects, it also reported that it was engaged in an ongoing project for a pipeline for the White Mountain Apache Tribe.

Fourth, we do not think that the partnership's proposed use of Agate's home office, which is located less than 2 miles from the project site, as opposed to Young & Joe's home office, which is located 160 miles away, establishes that Young & Joe is acting as a front for Agate--this just as easily can be viewed as a logical business decision. Similarly, we fail to see why the fact that a newly organized enterprise such as Young & Joe does not own its own equipment should be interpreted as evidence that it is acting as a front. The record reflects that Young & Joe will rely on several sources to obtain the equipment required for performance, including Salt River Sand and Rock, a company wholly owned by the Salt River Indian Community.

In sum, the record here does not support the contracting officer's finding that a majority of the partnership's earnings will accrue to its non-Indian owner or her finding that neither of the Indian owners will be involved in daily management of partnership business. The partnership agreement clearly provided for the accrual of a majority of the profits to the Indian owners and clearly vested authority for the management of the partnership's day-to-day business in the Indian owners.[5]

Given our conclusion that the agency did not have a reasonable basis for determining that Young & Joe did not qualify as an eligible Indian economic enterprise, and absent any evidence that the protester would otherwise have been ineligible for award, we recommend that the agency terminate the award to Blaze Construction and make award to Young & Joe Construction. We also recommend that the agency pay the protester the costs of filing and pursuing its protest. See Bid Protest Regulations, section 21.8(d)(1), 61 Fed Reg. 39039, 39046 (1996)(to be codified at 4 C.F.R. § 21.8(d)(1). In accordance with section 21.8(f)(1) of our Regulations, Young & Joe's certified claim for such costs, detailing the time

[5]We note that if it turns out that Mr. Young's involvement in management of the road project is in fact minimal and that BIA was correct in suspecting that Young & Joe Construction is only a front for Agate, the agency will be able to rely on this information to disqualify Young & Joe under future Buy Indian solicitations. Since Young & Joe is an ongoing business concern that presumably would like to compete for future BIA awards, we think that this is a significant enforcement mechanism.

expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of the decision.

The protest is sustained.

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