

**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

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**FILE:** B-210290

**DATE:** March 14, 1983

**MATTER OF:** Department of the Navy Request  
Advance Decision

**DIGEST:**

Where IFB qualification provision restricted bidding to U.S. contractors which have paid corporate taxes "for a minimum of one year," recently established corporation, in existence for less than 1 year, does not qualify under the provision.

The Department of the Navy, Naval Facilities Engineering Command, requests our decision as to whether a joint venture consisting of Six Construct International, Inc. of Texas (SCT) and the Herman Bennett Company, the low bidder under invitation for bids (IFB) No. N62470-81-B-1279, qualifies as a United States (U.S.) contractor under the terms of the solicitation. We conclude that the joint venture does not qualify as a U.S. contractor.

The IFB requested bids for a fixed-price construction contract for facilities expansion at Berbera, Somalia. The following provision was contained in the IFB:

"2.7 Bidding Restrictions: Bidding on this contract is restricted to United States Contractors only. To qualify as a United States Contractor, the bidder must comply with the following:

"(a) The principal place of business and corporate headquarters shall be in the United States.

"(b) Corporate taxes shall have been paid in the United States for a minimum of one year.

"(c) A majority of the Corporate officers shall be United States citizens.

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"(d) Key management and supervisory personnel shall be United States citizens."

The Navy explains that this provision is prompted by a Department of Defense policy to prefer U.S. firms for construction projects in the Indian Ocean/Persian Gulf region. In carrying out this policy, DOD cautioned the contracting agency to be alert to the possibility of firms which might be formed to exploit the policy.

On November 10, 1982, the Navy opened bids, and SCT/Bennett was low at \$34,624,048. The next low bid of \$34,729,051, was submitted by MWK International, Ltd., Inc. The Navy asked the low bidder to supply evidence that it qualified as a U.S. contractor. Prior to receiving a response, MWK protested to the Navy that the joint venture did not qualify as a U.S. contractor because SCT did not so qualify. SCT thereafter submitted documents to the Navy to support its qualifications. The Navy then requested our decision on whether SCT qualifies as a U.S. contractor under the four elements listed in the IFB.

Subsequently, MWK filed suit in the United States Claims Court (MWK International, Ltd., Inc. v. United States, No. 42-83C). The court was duly advised about the proceedings before our Office. The court issued a memorandum order denying MWK's application for a temporary restraining order, without prejudice to renew, because the Navy agreed to notify MWK at least 2 working days prior to any award of the contract under this solicitation. The court has stayed further action pending our decision.

In addition to the Navy's submission, we have also received submissions from SCT and MWK in support of their respective positions.

Briefly, in response to the Navy's request for evidence of its qualification as a U.S. contractor, SCT has submitted documentation showing that it was incorporated in Delaware on February 18, 1982, and was authorized to transact business in Texas on April 6, 1982. SCT lists as its principal place of business and corporate headquarters an address in Houston, Texas. It states that it has two corporate officers, both of whom (Mr. Charles Macmillan and

Mr. Ben Barnes) are United States citizens. It also has submitted a list of seven key management and supervisory personnel, including the project manager and general superintendent, to be used on the contract in the event of an award, and states that all of them are U.S. citizens.

As to SCT's tax filings, the record shows that on November 12, 1982, it filed a Federal corporation income tax return for the period from February 18, 1982 through October 31, 1982. As of the close of its fiscal year, the return shows that SCT had not engaged in any commercial enterprise for profit so that SCT reported no taxable income and paid no income tax. The record also shows that SCT filed quarterly Federal and state employer taxes such as social security and state compensation taxes, and that it paid state incorporation taxes.

Based on the above submissions, SCT argues that it qualifies as a U.S. contractor under the four elements listed in the IFB. While it has not paid corporate taxes for a full year, SCT argues that it has paid all the taxes that have been due during the period of its existence.

MWK argues that SCT really meets none of the four elements listed in the IFB because it is "simply a token organization" owned and controlled by a major Belgium construction contractor of the same name, and was formed to exploit the DOD preference policy for U.S. contractors. In support of its position, it states that at least three of the six directors of SCT are believed by MWK not to be U.S. citizens; that the Belgium contractor is believed by MWK to have financed SCT's recent organization and operation in the United States; and that Dun and Bradstreet reports and even a public advertisement from the Belgium firm itself indicate that SCT is "the domestic alter ego of a major international construction firm headquartered in Belgium." MWK also points to the fact that SCT has not been in existence for a full year and has paid no income taxes, as showing that it does not qualify as a U.S. contractor.

Initially we note that the other party to the joint venture, the Herman Bennett Company, does qualify as a U.S. contractor. Since joint ventures are usually formed

for a limited purpose and duration, we think that the qualification requirements, such as the 1-year tax provision, were obviously intended by the Navy to apply to the parties to the joint venture, not simply to the joint venture itself. Therefore, SCT's qualifications were properly put at issue by the Navy in determining whether the joint venture qualifies for award under the solicitation.

With respect to SCT's qualifications as a U.S. contractor, it is clear that the bidder meets three of the four IFB elements. MWK does not really refute SCT's statements as to the location of its principal place of business and corporate headquarters, and the United States citizenship of its corporate officers and named key personnel. Essentially MWK argues that one should look more closely at SCT's ownership and control to determine if SCT really meets the listed elements. But as the Navy notes, the IFB qualification provision makes no statement as to ownership of stock or control. We must therefore conclude that SCT qualifies as a U.S. contractor under paragraphs 2.7(a), (c) and (d) of the IFB provision, based on the evidence submitted.

The remaining element which must be met is paragraph 2.7(b). That paragraph provides that the bidder must have paid corporate taxes "in the United States for a minimum of one year" in order to qualify as a U.S. contractor. It is apparent to us that a corporation which has only been in existence for less than 1 year cannot meet this requirement. It is not sufficient, in our opinion, for a corporation to have existed and functioned only long enough to have filed some quarterly returns and a tax return for a short fiscal year. We read paragraph 2.7(b) as requiring that the bidder must have been a taxpayer in the United States for at least a full year. This requirement serves as an important safeguard against foreign contractors seeking to exploit the preference policy.

We have considered SCT's argument that paragraph 2.7(b) is unduly restrictive of competition. In other circumstances, we might well agree; however, we have no reason to object to its application in a situation like the one presented here, where a company established with foreign affiliation has not undertaken any construction business since its inception.

Therefore, even though SCT literally meets three of the four elements of the IFB qualification provision, we find that it does not qualify as a U.S. contractor under the IFB because it does not meet all of the listed elements. Accordingly the joint venture is not a qualified bidder for this contract.

We think, however, that paragraph 2.7(b) should be more precisely worded. The requirement is intended to apply to a foreign contractor attempting to qualify for this contract merely by forming a United States corporation to submit a bid for the contract. But a literal application of paragraph 2.7(b) could disqualify all recently-formed domestic corporations that have not yet paid corporate taxes for a full year. The requirement that "taxes shall have been paid" literally would also disqualify established United States concerns which actually earned no taxable income in recent years. Therefore, we recommend that the provision be revised before it is used again to more clearly reflect precisely what is intended.

*for*   
Comptroller General  
of the United States