



Comptroller General
of the United States

Washington, D.C. 20548

145696
Miller

Decision

Matter of: Calvin Corporation

File: B-245768

Date: January 22, 1992

Raymond L. Lancer for the protester,
James L. Weiner, Esq., and Justin P. Patterson, Esq.,
Department of the Interior, for the agency.
Behn Miller, Esq., and Andrew T. Pogany, Esq., Office of the
General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

Determination of the Bureau of Indian Affairs that a joint venture comprised of the Indian-owned concern and a concern not Indian-owned does not qualify as a Buy Indian concern, as required by the solicitation, is not unreasonable, where protester has failed to demonstrate that Indian owner is involved in the daily business management of the enterprise and there is no evidence that the majority of the venture's earnings accrue to Indian persons.

DECISION

Calvin Corporation protests the rejection of the HCC Joint Venture bid under invitation for bids (IFB) No. BIA-M00-91-18, issued by the Bureau of Indian Affairs (BIA), Department of the Interior, for road construction at the Mescalero Apache Indian Reservation, Otero County, New Mexico. Calvin objects to BIA's determination that HCC--a joint venture comprised of Calvin and Hunter Contracting Company, Inc.--is not a valid Buy Indian concern for purposes of this procurement.

We deny the protest.

The IFB was issued by BIA's Albuquerque Area Office on May 21 as a total set-aside for 51 percent "Buy Indian" concerns pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1988), and required offerors to complete a "Buy Indian Certification Statement." At the June 21 bid opening, four bids were received; HCC was the apparent low bidder. By letter dated June 24, the contracting officer requested

several documents from HCC to verify its "Buy Indian" status. Specifically, the contracting officer asked for copies of HCC's Tribal Enrollment Certificate, Indian birth certificate, Certificate of Incorporation, Articles of Incorporation, corporation by-laws, Joint Venture Agreement and financial statement. On June 25, HCC supplied BIA with all the requested documents except the Calvin president's Indian birth certificate. Because the Albuquerque BIA had no prior experience with either Calvin or HCC, the contracting officer--on August 28--scheduled a September 6 meeting between Calvin, Hunter and BIA officials at the Hunter Company offices.

As a result of representations made by Calvin and Hunter officials at the September 6 meeting, observation of the Calvin president's conduct, and review of the documents furnished by HCC to establish its Buy Indian status, the Albuquerque BIA contracting personnel determined that HCC did not qualify as a Buy Indian concern for this procurement; specifically, BIA found that Hunter, not Calvin, essentially controlled and managed the venture. Accordingly, on September 12, BIA made contract award to the second-low bidder, Blaze Construction Company.¹ On September 13, BIA notified HCC that its bid had been rejected; on September 20, HCC filed this protest with this Office.

Calvin argues that despite Hunter's participation in the venture, HCC constitutes a valid Buy Indian concern since Calvin owns 51 percent of the venture and will control and directly supervise the proposed project. According to Calvin, Hunter's role in the venture is strictly one of financial assistance.

The Secretary of the Interior, acting through the BIA Commissioner, has broad discretionary authority to implement the Buy Indian Act, and it is well established that defining the criteria a firm must meet to qualify as an Indian enterprise, and the quantum of evidence required to establish compliance with the required criteria, falls within that broad discretion. Northwest Piping, Inc., B-232644, Jan. 23, 1989, 89-1 CPD ¶ 53. Because of this discretionary authority, we will only disturb a determination that a business does not constitute a Buy Indian concern where that determination is unreasonable. Id. In this case, we find nothing improper in the contracting officer's determination that HCC is not a qualified Buy Indian concern. Under the terms of the IFB, firms eligible to compete under Buy Indian

¹In this regard, Blaze Construction has a well-established history with the Albuquerque BIA as a Buy-Indian contracting concern.

set-asides must not only be Indian owned, they must also be Indian controlled as evidenced by active Indian participation in the daily business management of the enterprise and the majority of the firm's earnings (51 percent or more) must accrue to Indian persons. Despite HCC's written representations that Calvin owned 51 percent of the joint venture, at the September 6 meeting contracting personnel discovered several facts about the HCC joint venture which led to their determination that Calvin would not actively participate in the Mescalero project.²

First, the contracting personnel learned that the Calvin president³--who was present at the hearing and in apparent ill-health--resided over 150 miles from the Phoenix, Arizona, area where both Calvin and Hunter are located. Additionally, although PIA officials clearly explained that all questions required a response from the Calvin president, the other Calvin and Hunter officials--who are not American Indians--provided initial responses which the Calvin president would briefly confirm. The BIA officials also learned that the Calvin president's background was in computer science rather than construction. In this regard, the other Calvin officer informed BIA officials that he would act as Project Manager and be the on-site Project Superintendent for the Mescalero road construction; officials were also informed that all contract specification problems would be referred to the Hunter staff. When questioned specifically by BIA contracting personnel, the Calvin president indicated that with respect to his role in the instant project, he would solve "tribal related" problems.

Other factors also led BIA contracting personnel to conclude that Hunter would unduly influence or control the actual management of the Mescalero project. For example, officials were informed that because Calvin owns no construction equipment, Hunter would provide all operating capital for the venture and all construction equipment--unless it could be leased from other Indian concerns. Officials also learned that Hunter would control all negotiations for the venture's bonding, banking, loans and letters of credit; Hunter would perform all bookkeeping and accounting services and monitor the project's job costs. Based on the above information, contracting personnel

²The officials who were present at the September 6 meeting were the Albuquerque BIA contracting officer, contracting specialist and Roads Program Administrator, the Calvin president, a Calvin officer and the Hunter president.

³Calvin apparently derives its Indian-owned status through its president who is a 100 percent Navajo Indian; he is the only Indian who has ownership in the Calvin corporation.

concluded that no American Indian would actively control the daily management of this construction project.

The BIA contracting personnel also found no evidence that the profits of the HCC venture would accrue to Indian persons or concerns. As set forth in the joint venture agreement, Calvin will receive 51 percent of each venture project's profits. However, while an American Indian is the apparent owner and sole shareholder of Calvin,⁴ there is no evidence that the Calvin profit will accrue to the benefit of that shareholder or any other American Indian; rather, under the terms of the Calvin corporation by-laws, the non-Indian management of Calvin could receive the majority (51 percent or more) of Calvin's revenues from the venture, in contravention of BIA's Buy Indian set-aside eligibility requirements set forth in the IFB.⁵

In its comments on the agency report, Calvin concedes that the documentation it submitted may have confused the Albuquerque BIA with respect to whether the Calvin president would actively manage the instant construction project and whether the majority of the venture's profits would accrue to Indian persons and concerns. Accordingly, Calvin has provided this Office with an amendment to the HCC joint venture agreement--dated October 28--which purports to clarify the venture's compliance with the management and profit eligibility requirements discussed above by adding two new clauses to the profit and management sections of the joint venture agreement.

We do not find this submission persuasive since both BIA proposed regulations⁶ and the solicitation clearly state that an offeror's status as an Indian economic enterprise

⁴In its June 25 response to the Albuquerque BIA's document request, Calvin provided copies of stock certificates indicating that 26,180 shares were canceled on June 6, 1991, and 1,000 shares were issued on that date to the current Calvin president, making him the apparent sole-shareholder. However, according to the minutes of the June 6 annual meeting of shareholders and directors, there was no consideration paid by the current Calvin president for the newly issued shares, thus raising the question of the Calvin president's capital contribution and associated risk in both the Calvin Corporation and the HCC joint venture.

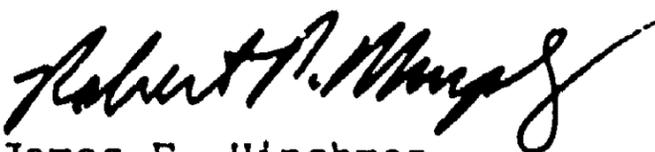
⁵Similarly, under the terms of the joint venture agreement, the majority (51 percent or more) of HCC's profits could accrue to the venture's non-Indian management.

⁶See 56 Fed. Reg. 46,468-46,481 (1991) (to be codified at 48 C.F.R. §§ 1401 and 1499).

must "exist when an offer is made." Moreover, in our view, the two new clauses do not provide sufficient clarifying detail to establish HCC as a Buy Indian enterprise. The "Income Distribution" clause merely reiterates that "the joint venture will distribute the remaining funds 51 [percent] to The Calvin Corporation." The "Managing Partner" provision--although identifying the Calvin president as the joint venture's Managing Partner and the duties associated with this position--does not eliminate the evidence obtained through BIA discoveries at the September 6 meeting that the eligibility requirements for Buy Indian status have been met.

Calvin also argues in its comments that the Albuquerque BIA's determination that HCC is not a valid Buy Indian concern is unreasonable since BIA's Phoenix Area Office recently determined that HCC was a qualified Indian economic enterprise for a procurement in that region. We find this assertion unpersuasive since each federal procurement stands on its own; the fact that BIA's determination as to Buy Indian set-aside eligibility may have been different under the particular circumstances of another procurement does not establish the unreasonableness of BIA's determination of HCC's non-eligibility here. See Commercial Energies, Inc., B-238208, Apr. 5, 1990, 90-1 CPD ¶ 368. Rather, based on its findings that no Indian person or concern would control the daily management of the Mescalero project as well as HCC's failure to demonstrate that the majority of profits from this project would accrue to Indian persons or concerns, we find the Albuquerque BIA's determination that HCC is not qualified as a Buy Indian concern for this procurement to be proper.

The protest is denied.


James F. Hinchman
General Counsel