



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Arrowhead Construction, Inc./FNF Construction, Inc.

File: B-251707; B-251708

Date: April 19, 1993

Daniel L. Bonnett, Esq., Renaud, Cook, Videan, Geiger & Drury, P.A., for the protester.
Sherry Kinland Kaswell, Esq., and Justin P. Patterson, Esq., Department of the Interior, for the agency.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bureau of Indian Affairs reasonably determined that a joint venture, comprised of an Indian-owned firm and a firm which was not Indian-owned, did not qualify as an Indian economic enterprise eligible for award under Buy Indian set-aside procurements where the joint venture failed to clearly demonstrate that the Indian-owned firm would control and be involved in the daily management of the joint venture.

DECISION

Arrowhead Construction, Inc./FNF Construction, Inc. protests the rejection of the bids submitted by Arrowhead Joint Venture (AJV) under invitation for bids (IFB) Nos. N00-92-60 (IFB-60) and N00-92-64 (IFB-64), issued by the Bureau of Indian Affairs (BIA), Department of the Interior, for roadway construction projects in Arizona. The protester challenges the contracting officer's determination that AJV, comprised of Arrowhead, an Indian-owned firm, and FNF, a firm which was not Indian-owned, does not qualify as an Indian economic enterprise.

We deny the protests.

The IFBs were issued in August 1992 as total set-asides for 51 percent "Indian-owned and controlled" concerns pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1988). The IFBs required bidders to certify that they were eligible "Indian economic enterprises," defined in the IFBs as any business entity which "(1) is at least 51 percent owned by one or more Indians(s) or (an) Indian Tribe(s); and (2) one or more of those owners must be involved in daily business

management of the economic enterprise; and (3) the majority of the earnings of [the economic enterprise must] accrue to such Indian person(s)."

Two bids were received for IFB-60 and three bids were received for IFB-64. For both IFBs, AJV was the apparent low bidder. In AJV's bids, the president and owner of Arrowhead, who was a member of a federally recognized Indian tribe, certified that AJV was an eligible Indian economic enterprise. BIA subsequently requested a copy of the joint venture agreement in order to verify that AJV satisfied the criteria for being an Indian economic enterprise.

The joint venture agreement, executed by the presidents of both Arrowhead and FNF, provided that Arrowhead and FNF respectively retained 51 percent and 49 percent interests in the joint venture. The joint venture agreement provided that the presidents of Arrowhead and FNF would comprise the two-member management committee, established to manage the daily affairs of the joint venture, and that the president of Arrowhead would chair the management committee. The joint venture agreement stated that the presidents of Arrowhead and FNF would have voting power equivalent to their respective interests in the joint venture. Thus, Arrowhead's president would have the authority to manage the daily affairs of the joint venture. However, the joint venture agreement also contained the following provision:

"17. DISPUTES:

"Any failure to reach unanimous agreement of any Major Decision (except as hereinafter provided) or any dispute or difference arising out of or relating to the work or the provisions of this Agreement shall be referred to arbitration as hereinafter provided.

"If either Party wishes that any matter be referred to arbitration, then such Party (the "Disputant") shall give notice in writing to the other Party (the "Respondent") setting forth:

- a. the issues that it wished to be arbitrated;
- b. its position on such issues; and
- c. the name of the proposed arbitrator

"The arbitrator shall forthwith proceed to arbitrate the matter and shall, so soon thereafter as may be practicable under the circumstances, render his decision in writing and shall cause such decision to be served on each of the parties and the decision of such arbitrator shall be final and binding on both parties"

The contracting officer found that the arbitration provision could effectively limit Arrowhead's control and involvement in the daily management of the joint venture because a third-party arbitrator would resolve "any major decision or any dispute or difference" relating to the work or to provisions in the joint venture agreement whenever the presidents of Arrowhead and FNF, the two parties to the joint venture agreement, could not reach unanimous agreement on such matters. Because of the arbitration provision, and a number of other provisions in the joint venture agreement, the contracting officer determined that AJV did not clearly demonstrate Arrowhead's control and involvement in the daily management of the joint venture. Accordingly, the contracting officer rejected AJV's bids based on his conclusion that AJV did not satisfy the Indian economic enterprise criteria and therefore was not eligible for award under these Buy Indian set-asides. The agency has not made any awards pending our decision on these protests.

AJV challenges the contracting officer's determination that it did not qualify as an Indian economic enterprise. Specifically, AJV contends that Arrowhead's required involvement in the joint venture is evidenced by the fact that pursuant to the joint venture agreement, the president of Arrowhead will chair the management committee, which was established to manage the daily affairs of the joint venture, and Arrowhead will have voting rights equivalent to its 51 percent interest in the joint venture. AJV also states that Arrowhead will receive 51 percent of any profits earned by the joint venture. With respect to the arbitration provision in the joint venture agreement, AJV argues that this provision will apply only when the presidents of Arrowhead and FNF cannot unanimously agree on matters affecting long-term assets and liabilities of the joint venture, matters which AJV contends are beyond the scope of decisions affecting the daily affairs of the joint venture. AJV also references a provision in the joint venture agreement which provides that when the terms and provisions of the joint venture agreement are inconsistent with the Buy Indian Act and related BIA policies as stated in a section of a BIA Manual, the statute and BIA policies will be controlling. AJV maintains that to the extent the arbitration provision is inconsistent with the BIA policy requiring the Indian-owned firm's control and involvement in the daily management of the joint venture, the BIA policy would in practice take precedence over the arbitration provision and would prohibit arbitration of matters affecting the daily affairs of the joint venture.

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. Calvin Corp., B-245768, Jan. 22, 1992, 92-1 CPD ¶ 98; White Buffalo Constr., Inc., 67 Comp. Gen. 206 (1988), 88-1 CPD ¶ 61. Because of this discretionary authority, we will only disturb a determination that a business does not constitute an Indian economic enterprise where that determination is unreasonable. Calvin Corp., *supra*.

In order for an economic enterprise, such as a joint venture, to be eligible for award under a Buy Indian set-aside, pursuant to BIA policy, the Indian owner must control the joint venture, as evidenced by its having a majority ownership interest in the joint venture; the Indian owner must be involved in the daily business management of the joint venture; and the Indian owner must receive the majority of any profits earned by the joint venture. Thus, pursuant to BIA policy, a joint venture eligible to compete under a Buy Indian set-aside must not only be Indian-owned, but must also be Indian-controlled as evidenced by active Indian participation in the joint venture such that would tend to increase Indian self-sufficiency. *See* Bureau of Indian Affairs Manual § 2.1 (1990). In this case, although Arrowhead, a 100 percent Indian-owned firm, had a majority interest in the joint venture and would receive the majority of any profits earned by the joint venture, we agree with the contracting officer that AJV did not demonstrate that Arrowhead would have the requisite control and authority to manage the joint venture on a daily basis.

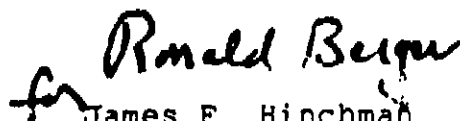
As the agency points out, the joint venture agreement contained a very broad arbitration provision which stated that "any failure [by the presidents of Arrowhead and FNF, the two parties to the joint venture agreement] to reach unanimous agreement of any [m]ajor [d]ecision . . . or any dispute or difference arising out of or relating to the work or the provisions of this [a]greement shall be referred to arbitration" Under this provision, if the president of Arrowhead or the president of FNF did not agree on either "any major decision," which is not defined in the joint venture agreement, or on "any dispute or difference arising out of or relating to the work or the provisions of" the joint venture agreement, Arrowhead could effectively lose the requisite control, either on its own initiative or by the action of FNF, over the joint venture. Specifically, Arrowhead could be forced to relinquish final and conclusive decisionmaking authority for "major decisions" or for "any disputes or differences" to a third-party arbitrator.

AJV maintains that the arbitration provision would only apply in limited circumstances involving the future assets and liabilities of the joint venture, matters which it contends are the "major decisions" contemplated by the joint

venture agreement and which it argues are outside the scope of managing the daily affairs of the joint venture. However, decisions involving the daily management of the joint venture could conceivably have a direct bearing on the future assets and liabilities of the joint venture. Moreover, the arbitration provision as worded is not as limited as the protester maintains. The words "any dispute or difference arising out of or relating to the work or the provisions of" the joint venture agreement clearly encompass any dispute about the work of the joint venture. Since daily management of the joint venture can reasonably be viewed as involving the work of the joint venture, the arbitration provision, reasonably interpreted, encompasses disputes concerning the daily management of the joint venture; thus, under the arbitration provision, daily management decisions could be placed in the control of a third-party arbitrator.

We do not think the contracting officer's concern with the arbitration provision should be vitiated by the provision in the joint venture agreement providing that the Buy Indian Act and a section of a BIA Manual setting forth implementing BIA policy will be controlling in the event of provisions in the joint venture agreement that are inconsistent with the Buy Indian Act or BIA Manual. We fail to see how this "savings" provision in the joint venture agreement would preclude arbitration if one of the parties to the agreement sought to refer a matter to arbitration. Certainly, there is no mechanism in the joint venture agreement which would allow the agency, which is not a party to the agreement, to prevent resort to arbitration. Thus, while AJV argues that the "savings" provision would prohibit arbitration if one of the parties to the joint venture agreement sought it, we are not persuaded that the provision would preclude an arbitrator from hearing and deciding the matter referred. Thus, we think the contracting officer could reasonably conclude that the joint venture agreement was at best ambiguous as to the degree of control and management to be exercised by Arrowhead, the Indian-owned firm, and therefore could reasonably determine that AJV did not qualify as an Indian economic enterprise eligible for award under these Buy Indian set-asides.

Accordingly, the protests are denied.


James F. Hinchman
General Counsel