



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Yellowhorse Joint Venture

File: B-252072

Date: June 2, 1993

Jane Yellowhorse, Robert J. Wheeler, and Virginia S. Ornelas, Esq., for the protester.
James L. Weiner, Esq., and Justin P. Patterson, Esq.,
Department of the Interior, for the agency.
Jacqueline Maeder, Esq., and Glenn Wolcott, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

A joint venture, comprised of an Indian-owned firm and a firm which was not Indian-owned, does not qualify as an Indian economic enterprise eligible for award under Buy Indian set-aside procurement 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

Yellowhorse Joint Venture (YJV) protests the rejection of its bid submitted under invitation for bids (IFB) No. N00-92-62 issued by the Bureau of Indian Affairs (BIA), Department of the Interior, for road construction on the Navajo Indian Reservation. The protester challenges the contracting officer's determination that YJV, comprised of Yellowhorse Industries, an Indian-owned firm, and Wheeler Construction, Inc., a firm which was not Indian-owned, does not qualify as an "eligible Indian economic enterprise."

We deny the protest.

The IFB was issued on August 28, 1992, as a total set-aside for Indian-owned and controlled concerns pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1988). The IFB required each bidder to certify that it was an "eligible Indian economic

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enterprise," defined in the IFB as a business entity which:

"(1) is at least 51 percent owned by one or more Indian(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)."

The IFB stated that these requirements "must exist when an offer is made to a solicitation, at the time of award, and during the term of the contract." With regard to joint venture agreements, the IFB further stated:

"The offeror (bidder) shall furnish copies of any joint venture agreement that it entered into in order to secure a Buy Indian contract by the time set for bid opening. Failure to furnish a copy of the required joint venture agreement shall cause the bid to be rejected."

Six bids, including YJV's, were received by the September 28 bid opening date. YJV was the apparent low bidder. In its bid, YJV certified that it was an "eligible Indian economic enterprise" and submitted a joint venture agreement (hereinafter referred to as the "original joint venture agreement") that had been executed by the presidents of Yellowhorse and Wheeler on September 28, 1992.

The "original joint venture agreement stated that Yellowhorse "will have 100% control of the project," but was silent regarding the percentage of the joint venture that was Indian-owned. The original joint venture agreement also provided generally that "[Wheeler] will . . . enter into subcontracts with [YJV] for portions of the project" and, specifically, that "[Wheeler] shall enter into a subcontract with [YJV] called a Construction Management Agreement." The referenced construction management agreement was not submitted to the agency with YJV's bid.

On October 30, more than a month after bids were submitted, YJV submitted a "Master Joint Venture Agreement" to the agency; this agreement had been executed on October 15. The cover letter accompanying the master joint venture agreement stated:

"[W]e are required to submit to the [BIA] a copy of any changes or amendments to our [original joint venture agreement]. We are therefore enclosing a copy of our Master Joint Venture Agreement which, according to its terms, replaces all prior agreements. Any agreement entered into

prior to the Master Joint Venture Agreement is no longer a valid agreement."

By letter dated January 8, 1993, the contracting officer advised YJV that it did not qualify as an "eligible Indian economic enterprise." In making that determination, the contracting officer assessed the status of the joint venture based on the provisions of the original joint venture agreement without considering the master joint venture agreement. Based on the terms of the original joint venture agreement, the contracting officer concluded that Wheeler would be responsible for preparing the bid, obtaining the necessary bonds, and performing the construction work. The contracting officer concluded that these terms, along with the subcontracting provisions of the original joint venture agreement, created substantial doubt that Yellowhorse would exercise control over the joint venture or receive a majority of the earnings resulting from the joint venture's activities.

In evaluating YJV's status, the contracting officer was aware that, approximately 2 months earlier, Yellowhorse and Wheeler had bid as a joint venture on a similar set-aside procurement, providing with their bid a joint venture agreement and a construction management agreement. In that earlier procurement, contrary to a statement in the joint venture agreement that Yellowhorse would have 100 percent control of the project, the construction management agreement provided that Wheeler would perform all management services related to subcontracting, negotiating, reporting, scheduling, coordinating, inspecting work by subcontractors, and administering change orders. Based on the inconsistency between the construction management agreement and the joint venture agreement, the contracting officer had determined that the joint venture failed to qualify as an eligible Indian economic enterprise.¹

¹In that earlier procurement, Yellowhorse filed a protest with our Office challenging the contracting officer's determination. We denied the protest stating:

"We agree with the contracting officer that the documents submitted by the protester did not establish that the joint venture was . . . Indian controlled so as to increase Indian self-sufficiency.

"Moreover, the documents submitted by the protester also have other deficiencies. For example, the two documents, when read together, did not establish the proportion of profits to go

(continued...)

Here, based on the provisions of the original joint venture agreement, the contracting officer's knowledge of the facts related to the earlier procurement, and the fact that YJV had not provided the referenced construction management agreement, the contracting officer concluded that YJV had not established that it qualified as an eligible Indian economic enterprise. This protest followed.

YJV first protests that the contracting officer acted improperly in failing to consider the master joint venture agreement when assessing YJV's eligibility for award. YJV maintains that it should have been permitted to qualify as an "eligible Indian economic enterprise" at any time prior to award since its status under the Buy Indian Act should have been treated as a matter of responsibility, not responsiveness.² In short, YJV maintains that the contracting officer "was legally obligated to consider and base his determination of eligibility upon the Master Joint Venture Agreement."

The agency responds that it was precluded from giving any consideration to the master joint venture agreement in determining YJV's eligibility for award since that agreement was submitted more than a month after bid opening and because the master joint venture agreement was "not a clarification or explanation of the [parties'] status at the time of bid opening," but "a change in their status" reflecting the parties' attempt after bid opening to qualify YJV as an eligible Indian economic enterprise by redefining the parties' relationship.

We agree with the contracting officer that, in this procurement, he was obligated to consider YJV's status at the time bids were submitted since both BIA proposed

¹(...continued)

to each joint venturer even though the Joint Venture agreement seemingly provided for

Yellowhorse to receive 51 percent of the profits." Yellowhorse Indus., B-250282, Jan. 12, 1993, 93-1 CPD ¶ 35.

²A bidder's "responsiveness" refers to the commitment of a bidder to furnish conforming items or required services and must be established from the bid itself at bid opening. A bidder's "responsibility" concerns the bidder's capability or eligibility to perform a contract and generally may be established after bid opening but prior to award. See Infab Corp., B-238423, May 29, 1990, 90-1 CPD ¶ 506.

regulations³ and the solicitation clearly stated that an offeror's status as an eligible Indian economic enterprise must "exist when an offer is made." See Yellowhorse Indus., B-250282, Jan. 12, 1993, 93-1 CPD ¶ 35; Calvin Corp., B-245768, Jan. 22, 1992, 92-1 CPD ¶ 98. Although YJV could clarify or explain its status after bids were submitted, for purposes of the joint venture's eligibility for award, clarifications could only properly relate to the status of the joint venture at the time bids were submitted. Revisions to the parties' relationship would not cure a joint venture's ineligibility at the time it submitted its bid.⁵ On this record, we agree that the contracting officer properly considered only the original joint venture agreement that was submitted with YJV's bid and information regarding the parties' status at the time the bid was submitted. Id.

Alternatively, YJV argues that the contracting officer was required to qualify it as an eligible economic enterprise on the basis of the original joint venture agreement. As discussed above, the contracting officer responds that the provisions of the original joint venture agreement, in light of other information known to the contracting officer, were insufficient to demonstrate that Yellowhorse would exercise the requisite control over the joint venture.

The Secretary of the Interior, acting through the BIA Commissioner, has broad discretion to define the criteria a firm must meet to qualify as an Indian enterprise and the quantum of evidence necessary to establish compliance. We will disturb such decisions only where they are shown to be arbitrary, unreasonable, or in violation of law or regulations. 25 U.S.C. § 47; White Buffalo Constr. Co., 67 Comp. Gen. 206 (1988). In this regard, it is the duty of a bidder to supply all documentation necessary to establish its qualifications as an eligible offeror. See McGhee

³See 56 Fed. Reg. 46,468-46481 (1991) (to be codified at 48 CFR §§ 1401 and 1499).

⁴The rule here is similar to the rule applied in the context of small business set-aside procurements when the Small Business Administration required, through its regulations, that offerors qualify as small business concerns both at time bids were submitted and at the time of award. See, e.g., Sentinel Protective Servs., Inc., B-187053, Sept. 30, 1977, 77-2 CPD ¶ 248; see also 13 C.F.R. § 121.904 (1993).

⁵Here, the letter the protester submitted with the master joint venture agreement specifically referred to that agreement as a "change or amendment," providing that the original joint venture agreement was no longer valid.

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Constr., Inc., B-233763.2, Apr. 4, 1989, 89-1 CPD ¶ 352. Under this solicitation, in order for a joint venture to be eligible for award, the Indian joint venturer was required to demonstrate that it held at least a 51 percent ownership interest in the joint venture, that it would control the joint venture and be involved in the daily business management of the project, and that it would receive a majority of the joint venture's earnings.⁶

Here, the contracting officer reasonably concluded that YJV failed to demonstrate that it met the eligibility requirements. As discussed above, the terms of the original joint venture agreement indicated that Wheeler would prepare the bid, obtain the necessary bonds and perform the construction work. Wheeler's address was listed as the principal place of business, leading the contracting officer to believe the joint venture planned to use Wheeler facilities during contract performance. The original joint venture agreement also stated that the parties would execute a construction management agreement, and the contracting officer knew that Yellowhorse and Wheeler had recently executed a construction management agreement in connection with a similar set-aside procurement which, contrary to the joint venture agreement submitted in that procurement, provided that Wheeler would exercise substantial control over the joint venture. Due to the striking similarity of facts in the two procurements, we believe the provisions of the original joint venture agreement, including the reference to a construction management agreement, raised reasonable doubts regarding whether Yellowhorse would exercise the requisite control, be involved in the daily business management of the enterprise, and receive a majority of the earnings as required by the solicitation.⁷ On this record, we cannot question the contracting officer's determination that YJV failed to adequately establish its qualifications as an eligible offeror.

Finally, YJV protests that the contracting officer acted in bad faith, questioning the contracting officer's "secretive efforts" to obtain information concerning the construction management agreement that YJV submitted in response to the


⁶These requirements reflect BIA policy in that 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 tending to increase Indian self-sufficiency. See Bureau of Indian Affairs Manual § 2.1 (1990).

⁷The original joint venture agreement was silent regarding the amount of Indian ownership of the joint venture.

earlier procurement. YJV argues that this "underhanded conduct" shows that the contracting officer "will go to any length to be certain that [YJV] does not qualify as an eligible Indian economic enterprise."

To show bad faith, a protester must submit establish that the contracting agency directed its actions with the intent to injure the protester. Pratt & Lambert, Inc., B-245537; B-245538, Jan. 9, 1992, 92-1 CPD ¶ 48. The protester has not done so here.

The protest is denied.


for James F. Hinchman
General Counsel