



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: American Eagle Industries, Inc.; Yellowhorse,
Joint Venture

File: B-255251; B-255251.2

Date: February 22, 1994

Tina M. Joseph and Edwardo Zuniga for American Eagle Industries, Inc., and Virginia S. Ornelas, Esq. for Yellowhorse, Joint Venture, protesters.
James L. Weiner, Esq., and Justin P. Patterson, Esq., Department of the Interior, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Bureau of Indian Affairs (BIA) properly found firm ineligible for award of a contract set aside for Indian economic enterprises where record shows that the individual primarily responsible for management of the enterprise's daily business has not provided evidence of Indian descent and does not possess an ownership interest in the concern.
2. BIA properly considered firm's affiliation with a non-Indian firm under the Department of Defense Mentor-Protege program; statute only precludes consideration of mentor-protege relationship for purposes of the Small Business Act.
3. Protest that BIA unreasonably found that qualifying Indian owner holding majority interest in joint venture would not be involved in the daily business management of enterprise is denied where evidence relied on by agency reasonably led it to question whether the firm's Indian owner would be involved in the daily business management of the enterprise.

DECISION

American Eagle Industries, Inc. (AEI), and Yellowhorse, Joint Venture (Yellowhorse, J.V.) protest the award of a contract to HCC Joint Venture under invitation for bids (IFB) No. SB-93-0018, issued by the Department of the Interior, Bureau of Indian Affairs (BIA), for the construction of a bridge and a section of roadway on the San Carlos Indian Reservation in Arizona. Both protesters argue

that the BIA improperly found them ineligible for award of the contract.

We deny the protests.

The IFB was issued as a total set-aside for Indian-owned-and-controlled enterprises pursuant to the Buy Indian Act, 25 U.S.C. §47 (1988). In order to be eligible for award, firms were required by the IFB to certify that (1) the enterprise is at least 51 percent owned by one or more individuals qualifying as Indians; (2) one or more of the Indian owners will be involved in the daily business management of the enterprise; and (3) the majority of the enterprise's earnings will accrue to the Indian owners. AEI was the apparent low bidder and Yellowhorse was third-low bidder. (The second-low bidder was also found ineligible but did not timely protest the matter.) All three firms were found ineligible for award on the ground that they did not qualify as Indian-owned-and-controlled enterprises.

With respect to AEI, the agency found that there was some question whether the owner of AEI would be involved in the daily business management of the firm; another individual (the firm's vice president who does not have an ownership interest) was found by BIA to be primarily responsible for managing AEI's daily business. The agency also found that AEI had a relationship with another firm that is not an Indian-owned enterprise, M.A. Mortenson Company, under the Department of Defense (DOD) Mentor-Protege program¹. In BIA's view, this mentor-protege relationship raised an additional question regarding whether AEI had the management and financial capabilities and resources to perform the contract and be involved in the daily business management of the enterprise, and also whether the majority of the earnings would accrue to AEI. Based on these considerations, BIA found AEI ineligible for award.

As for Yellowhorse, J.V., BIA found that although the joint venture enterprise (comprised of Yellowhorse Industries and a non-Indian firm, Wheeler Construction, Inc.) was 51 percent owned by a qualifying Indian, the daily management of the enterprise would not be handled by a qualifying

¹The DOD Mentor-Protege program was established to provide incentives to major DOD contractors to furnish assistance to small disadvantaged business concerns. See 10 U.S.C. §2301, note (Supp. IV 1992). Under the program, a qualified large business establishes a mentor-protege relationship with a qualified small disadvantaged business to provide the latter with developmental assistance; the particular type of assistance to be furnished varies according to the needs of the small disadvantaged business.

Indian owner. The agency based its conclusion primarily on the activities surrounding another contract that had been awarded to the joint venture by the Federal Highway Administration (FHA).

AEI's PROTEST

AEI argues that BIA erred in finding it ineligible. AEI maintains that, in fact, its owner does participate in the daily management of the enterprise and that its vice president acts at all times under the specific direction of the firm's owner. AEI also maintains that it was improper for BIA to find it ineligible for award based on its relationship with Mortenson under DOD's Mentor-Protege Program. According to AEI, the statute creating the program contains a clause that was intended to preclude BIA's consideration of its affiliation with Mortenson in determining its eligibility.

The Secretary of the Interior, acting through the BIA Commissioner, has broad discretionary authority to implement the Buy Indian Act. Defining the criteria that a firm must meet to be eligible for award under a Buy Indian Act set-aside, and determining the quantum of evidence necessary to establish compliance with those criteria, falls within that broad discretion. Calvin Corp., B-245768, Jan. 22, 1992, 92-1 CPD ¶ 98. Consequently, we will only disturb a BIA conclusion regarding a firm's eligibility where it is shown to be unreasonable. Id.; Arrowhead Constr., Inc./FNE Constr., Inc., B-251707; B-251708, Apr. 19, 1993, 93-1 CPD ¶ 334.

BIA's conclusion regarding AEI's eligibility is unobjectionable, since there was a reasonable basis for the agency to doubt whether AEI's Indian owner would be involved in the daily business management of the enterprise. The record shows that the daily management of AEI's affairs is handled primarily by the firm's vice president, an individual having no ownership interest in the firm and not recognized as an Indian.¹ In this regard, the vice president prepared and signed AEI's bid (as well as all correspondence accompanying the bid); executed many of the firm's representations and certifications (such as its

¹The record shows that the vice president claims to be of Mescalero Apache descent; however, he has not furnished any documentation in support of this claim, such as the certificate of tribal affiliation furnished by AEI's owner. In addition, although the record shows that the vice president is acquiring an ownership interest in the firm, the transfer of stock is to occur during 1994, well after the award date in September 1993.

certificate of procurement integrity); signed the bid bond on behalf of AEI; and executed an affidavit supporting the accuracy and veracity of various materials (such as the firm's books and balance sheets) that had been furnished in response to a BIA request.

The record also contains the vice president's resume, which describes his responsibilities as including securing all necessary licenses and permits for the performance of work, ensuring that subcontracts are timely and properly performed, and acting as AEI's Native American liaison officer, equal employment opportunity officer and small disadvantaged business liaison officer. In this connection, the record contains a wide variety of correspondence with both federal government agencies and private entities that was either executed by, or addressed to, the vice president. Finally, the record contains a broad delegation of corporate powers which authorizes the vice president to enter into contracts and negotiate on behalf of the firm, as well as to do "all other things and acts which he determines necessary" to obtain and negotiate contracts. When viewed in the aggregate, we agree with BIA that the evidence shows the daily business management of the firm is handled primarily by the vice president, as opposed to AEI's Indian owner.

AEI's association with Mortenson provided further support for BIA's determination--the record contains copies of both the firms' mentor-protege agreement and a subcontracting agreement--since it raised a question as to whether AEI would manage and fund the contract and receive the majority of the earnings from the project. First, contrary to AEI's argument, the DOD Mentor-Protege program statute does not preclude BIA from considering a firm's mentor-protege affiliation for purposes of determining Indian set-aside eligibility; rather, agencies are only precluded from using this information in reviewing a firm's status under the Small Business Act, 15 U.S.C. § 631 (1988). The statute provides in relevant part: "[f]or purposes of the Small Business Act, a protege firm may not be considered an affiliate of a mentor firm solely on the basis that the protege firm is receiving assistance . . . from such mentor firm. . . ." As there is no equivalent provision or language addressing a firm's status under the Buy Indian Act, BIA properly could consider AEI's relationship with Mortenson for eligibility purposes. See Department of the Air Force--Recon., B-250465 et al., June 4, 1993, 93-1 CPD ¶ 431 (General Accounting Office focuses on "plain meaning" of language when determining the proper interpretation of a statute or regulation).

The mentor-protege agreement contains a list of the possible types of assistance which can be provided by Mortenson to AEI. The list includes executive management services (such.

as assistance with bonding and banking relationships, and equipment management), as well as field and project management assistance (such as engaging in subcontracting, and conducting inspections). The agreement goes on to state "it is initially envisioned that the mentor will act in a construction management capacity for the protege on initial project opportunities in order to provide sufficient financial strength, management capability, bonding capacity, etc. . . ."

The proposed subcontracting agreement (which would make Mortenson a subcontractor to AEI) similarly requires Mortenson to perform a variety of services, including preparing cost reports, assisting in handling purchase requirements and change orders, and providing a quality assurance manager. The financial terms of the agreement are even more significant. The agreement provides for payment of all of Mortenson's expenses, as well as an undisclosed fee; also, under an ancillary agreement AEI would use Mortenson's proprietary accounting system, and deposit all contract proceeds into Mortenson's corporate account prior to making any disbursements.

Since the amounts to be paid to Mortenson are undisclosed under the subcontract agreement, that agreement also call into question whether AEI would receive the majority of the project's earnings.

In sum, we find that BIA acted reasonably in finding AEI ineligible, both because of the questions surrounding the role of its qualified Indian owner, and also because of the firm's affiliation with Mortenson. We therefore deny AEI's protest.

YELLOWHORSE, J.V.'s PROTEST

Yellowhorse, J.V. was also found ineligible under the Buy Indian Act requirements. BIA based its conclusions in part on a review of the joint venture's performance during another contract awarded by the Federal Highway Administration (FHA) (referred to as the Spider Rock project). BIA investigated Yellowhorse's performance on the Spider Rock project by telephonically contacting two FHA officials--the project engineer and a contract administration technician. These individuals provided information to the effect that most of the work on the Spider Rock project was performed by Yellowhorse's joint venturer, Wheeler Construction, Inc. and that Jane Yellowhorse was never at the construction site. BIA also reviewed other contracts that had been performed by Yellowhorse Industries (as opposed to Yellowhorse, J.V.) and found that, because these contracts were primarily supply contracts rather than road construction contracts, there was a question whether Jane Yellowhorse has the

experience and technical expertise necessary to manage the current construction contract. Finally, BIA reviewed Jane Yellowhorse's financial statements and concluded that she did not have adequate financial resources to capitalize her proportionate share of the contract.

Yellowhorse argues that BIA erred in concluding that Jane Yellowhorse would not be involved in the daily business management of the project. In support of its position, Yellowhorse has provided information which it maintains shows that BIA's conclusions regarding Yellowhorse's performance on the Spider Rock project and Jane Yellowhorse are erroneous. Yellowhorse has also provided a copy of its joint venture agreement to show that Jane Yellowhorse in fact retains majority control over the joint venture and the daily business management of the enterprise.

As already noted, BIA has broad discretion to determine the criteria that a firm must meet to be eligible for award under a Buy Indian Act set-aside, as well as the quantum of evidence necessary to establish compliance with those criteria. Although Yellowhorse, J.V.'s joint venture agreement complies technically with the requirements of the Buy Indian Act, we think the agency had a reasonable basis to doubt whether Jane Yellowhorse would in fact participate in the daily business management of the enterprise. As discussed, BIA's investigation uncovered three pieces of information that the agency viewed as significant: Wheeler appeared to have performed almost all of the Spider Rock project (the only project the joint venture had performed), Yellowhorse's prior contracts were largely for equipment rental and aggregate supply, not road building, and Jane Yellowhorse's financial condition brought into question her ability to fund her proportionate share of the joint venture's capital requirements.

As for the joint venture's performance on the Spider Rock project, the record relied on by BIA shows that Jane Yellowhorse was not significantly involved in the daily business management of the enterprise; both FIA employees that BIA spoke with were consistent in stating that Jane Yellowhorse was not at the job site on a regular basis and had not been involved in managing the joint venture's daily business on the project. (Indeed, the project engineer stated that her only involvement in the project had been obtaining an area for setting up a hot plant site and staging area site, and that he had only seen her once during the preconstruction meeting.)³

³Yellowhorse, J.V. submitted a letter prepared by the project engineer after this protest was filed in which he
(continued...)

As for the other Yellowhorse Industries contracts reviewed by BIA, the record shows that none involved road construction projects; these contracts were supply or equipment rental contracts, and the nature of them led BIA to doubt whether Jane Yellowhorse had the experience necessary to be involved in the daily business management of the joint venture. (By way of comparison we note that a number of the AEI contracts reviewed by BIA were for various types of construction.) Since the contract at issue here involves the construction of a portion of road as well as a bridge, we think that there was a reasonable basis for BIA to doubt Jane Yellowhorse's level of expertise. This, coupled with the fact that Yellowhorse Industries had no full-time employees other than Jane Yellowhorse and her husband and owned no equipment, reasonably led BIA's officials to question whether Jane Yellowhorse had the necessary expertise or resources to be engaged in the daily business management of the joint venture for purposes of this project.

Finally, the record shows that BIA reviewed Jane Yellowhorse's financial condition in concluding that she might be unable to fund her proportionate share of the joint venture's capital requirements. The record shows that Yellowhorse Industries has little in the way of financial resources beyond Jane Yellowhorse's personal net worth. Although the master joint venture agreement calls for Yellowhorse Industries to provide 51 percent of the joint venture's capital contributions, the joint venture did not explain during the agency's review of the matter how Yellowhorse Industries would meet this obligation, or whether Yellowhorse Industries had other current obligations which would detract from its ability to fund the current project.

We conclude that the evidence relied on by BIA, when viewed together, reasonably led the agency to question whether Jane Yellowhorse would be involved in the daily business management of the joint venture. It appears from our review that Jane Yellowhorse's involvement in the Spider Rock project was minimal, that her other contracts may not have provided her with the spectrum of experience necessary to be involved in managing this contract, and that there is at least some question regarding her financial capacity to meet her obligation to provide capital under the joint venture

³(...continued)

states that Yellowhorse, J.V.'s involvement in the project was "vital." Significantly, however, he does not represent that his earlier statements were erroneous, or that Jane Yellowhorse in fact played a larger role in the project than acquiring land for the hot plant and staging area sites.

agreement. While Yellowhorse, J.V., has provided our Office with information which it believes brings into question the agency's conclusion, a review of the material shows that none of the agency's fundamental concerns has been addressed.¹ In any case, the materials furnished by Yellowhorse, J.V., were prepared after its protest was filed; there was no requirement that BIA obtain this or any other specific information before reaching its conclusion.

The protests are denied.

Ronald B. Bury
for Robert P. Murphy
Acting General Counsel

¹For example, although Yellowhorse Industries has furnished information to show that it is a "registered contractor" in the state of Arizona, it is only registered as a crusher and supplier of aggregate road material. This is consistent with BIA's conclusion that Jane Yellowhorse does not have the expertise to manage a construction project as complex or large as the one at issue.