



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Chattin/Ashton, Inc., A Joint Venture

File: B-274956

Date: January 15, 1997

James W. Taylor, Esq., Burger & Plavan, for the protester.
Sherry Kinland Kaswell, Esq., Department of the Interior, for the agency.
Christina Sklarew, 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 procurement where the joint venture failed to clearly demonstrate that the Indian-owned firm would control the joint venture.

DECISION

Chattin/Ashton, Inc., A Joint Venture protests the rejection of its bid submitted under invitation for bids (IFB) No. SB-96-0011, which was issued by the Bureau of Indian Affairs (BIA), Department of the Interior, for road construction on the Tohono O'Odham Nation, Arizona. The protester contends that the agency improperly determined that the joint venture, comprised of Chattin Industries, Inc., an Indian-owned firm, and The Ashton Company, Inc., which is not Indian-owned, did not qualify for award as an eligible Indian economic enterprise.

We deny the protest.

The IFB was issued on June 17, 1996, as a total set-aside for Indian-owned concerns pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1994). The IFB required Indian economic enterprises to prepare a Representation Declaration as part of their bids, certifying their status as eligible Indian economic enterprises. The IFB defined "Indian economic enterprise" to mean:

"any business entity (whether organized for profit or not) 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 which accrue to such Indian person(s)."

The IFB stated, further, that these requirements had to exist when the firm's bid was submitted, at the time of award, and during the term of the contract.

Five firms, including Chattin/Ashton, submitted bids. When bids were opened, it was apparent that Chattin/Ashton had submitted the lowest price. However, the contracting officer had some concerns about the joint venture's eligibility as an Indian-owned economic concern and requested some additional information to clarify the issue. After reviewing Chattin/Ashton's response, the agency concluded that there was some question whether Chattin, as the Indian-owned concern, would receive a majority of the earnings under the contract and whether its owner would exercise control over the project.

The certification of eligibility as an Indian economic enterprise that Chattin/Ashton submitted with its bid showed that Chattin, which was designated as the Managing Party, has a 51-percent interest in the joint venture, while Ashton's interest is 49 percent. The agency questioned whether Chattin would, in fact, receive 51-percent of the earnings under the contract, since the joint venture agreement showed that Ashton would provide any funding necessary, and would receive 10-percent interest from the joint venture on its loan; in addition, Ashton would perform a number of administrative services, such as preparing the accounts payable, providing accounting services, preparing tax returns, providing safety training, and preparing the bid, for which it would be compensated at an unspecified rate. The contracting officer also questioned whether the joint venture agreement would allow Chattin to exercise control over the project or even be sufficiently involved in the daily management of the joint venture. Although Chattin was to be in the role of "Managing Party," the joint venture agreement provided that Chattin's authority would be "subject to the superior control and authority of the Management Committee," which would hold the ultimate decision-making authority. The Management Committee was to consist of two members, one from each of the two firms, with each member holding equal power. Any disputes between the two members were to be resolved by a third-party arbitrator. The contracting officer further noted that Ashton would provide the equipment for the project; Ashton's office would be the joint venture's principal place of business; Ashton's experience was more directly relevant to the work that was to be performed. The contracting officer concluded that Chattin/Ashton did not meet the Buy Indian Act's eligibility requirements and rejected its bid. Award was made to Blaze Construction as the second low bidder. This protest followed. Chattin/Ashton protests that the agency's ineligibility determination was unreasonable.¹

¹Chattin/Ashton first challenged the rejection of its bid on procedural grounds, arguing that the contracting officer failed to file a formal objection questioning the firm's eligibility declaration and failed to refer the matter to the chief of the
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As the protester recognizes, defining the criteria that a firm must meet to qualify as an Indian enterprise and the quantum of evidence required to establish compliance with the established criteria falls within the broad discretion of the agency. See Yellowhorse Indus., B-250282, Jan. 12, 1993, 93-1 CPD ¶ 35. Our Office will not disturb decisions regarding such eligibility unless they are shown to be arbitrary, unreasonable, or in violation of law or regulation. Arrowhead Constr., Inc./FNF Constr., Inc., B-251707; B-251708, Apr. 19, 1993, 93-1 CPD ¶ 334. Further, 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. Id.

Here, we think the agency could reasonably conclude that Chattin/Ashton failed to demonstrate that the Indian partner would exercise management and control of the joint venture, and that the rejection of the protester's bid was therefore reasonable. Notwithstanding Chattin's 51-percent interest in the joint venture, Chattin was to hold only 50 percent of the voting power on the Management Committee, the governing body of the joint venture. Specifically, the management committee is vested with authority "to act for and bind the parties to the Joint Venture in connection with all or any part of the performance of said contract." Any actions taken on behalf of the Joint Venture would require unanimous agreement by the Management Committee. After listing a number of duties the Project Manager was to fulfill, the joint venture agreement stated that "[n]otwithstanding this delegation of authority, the Management Committee may at any time direct the Project Manager in any manner by unanimous vote." In the event a unanimous agreement cannot be reached, the joint venture agreement's disputes provision requires the dispute to be settled by arbitration. In these circumstances, where the Indian-owned firm does not have sufficient voting power to prevail in a dispute regarding the performance of the contract or the operation of the enterprise, the Indian owner cannot be said to control the joint venture. See Arrowhead Constr., Inc./FNF Constr., Inc., supra; Yellow Horse Inds., supra.

¹(...continued)

contracting office, which it alleges is required by the Department of the Interior's BIA's Acquisition Regulation, as set forth at 48 C.F.R. Parts BIA 1480-1499.

However, the agency points out that the authority upon which the protester relies is a proposed regulation that has never been finalized or implemented. See Proposed Acquisition Regulations: Buy Indian Act Procedures for Contracting, 56 Fed. Reg. 46468, 46475.

Chattin/Ashton argues that the agency has erred by applying the wrong standard. Instead of requiring management and control of the contract, the protester states, the BIA manual requires "daily business management of the economic enterprise." 20 BIA Manual § 2.1.c (1990). Notwithstanding this assertion, we note that the joint venture was formed for the express purpose of performing the contract at issue, and thus we find the contract indistinguishable from the enterprise; moreover, the fact that Chattin will only hold 50 percent of the voting power on the Management Committee, which ultimately controls the actions taken on behalf of the joint venture, renders this distinction irrelevant.

The protest is denied.

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