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**Comptroller General  
of the United States**

**United States General Accounting Office  
Washington, DC 20548**

# Decision

**Matter of:** Colorado Construction Corporation

**File:** B-290960

**Date:** September 6, 2002

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Gary E. DiGrazia, Esq., Goicoechea, DiGrazia, Coyle and Stanton, for the protester. James L. Weiner, Esq., and Alton E. Woods, Esq., Department of the Interior, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## **DIGEST**

Agency's rejection of a bid submitted in response to a solicitation set-aside for Indian economic enterprises is unobjectionable where the agency reasonably questioned whether the Native American owner of the enterprise would be involved in the daily business management of the enterprise and whether the majority of the earnings from the contract would accrue to the Native American owner.

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## **DECISION**

Colorado Construction Corporation protests the rejection of its bid and award of a contract to Laguna Construction Company under invitation for bids (IFB) No. RBH00020006, issued as a total set-aside for Indian-owned and controlled firms by the Bureau of Indian Affairs (BIA), Department of the Interior, for the removal and disposal of existing bridges, and construction of new bridges. Colorado Construction's bid was rejected by the agency because of its determination that Colorado Construction was not an eligible Indian economic enterprise.

We deny the protest.

The IFB was issued as a total set-aside for Indian-owned and controlled concerns pursuant to the Buy Indian Act, 25 U.S.C. § 47 (2000). To be considered for award, the IFB required that bidders certify that they were at least 51 percent Indian-owned, that one or more of the Indian owners would be involved in daily business management of the enterprise, and that the majority of the earnings from the contract would accrue to the Indian owners. IFB at 88-89.

The agency received six bids by the April 17, 2002 bid opening. Colorado Construction, which submitted the second-low bid of \$1,737,800, became the apparent low eligible bidder after the low bidder declined the agency's request to extend its bid acceptance period.

By letter dated June 3, the contracting officer requested that Colorado Construction submit certain information required for the assessment of the firm's responsibility. The contracting officer requested, for example, that Colorado Construction provide its articles of incorporation; principal place of business and location of equipment yard; evidence that it had the production, construction, and technical equipment and facilities necessary to complete the project or the ability to obtain them; current financial statements; and a list of past road construction experience. Agency Report (AR), Tab 6, Contracting Officer's Letter to Colorado Construction (June 3, 2002).

Colorado Construction responded to the agency's request on June 14. Because of certain issues raised in Colorado Construction's response, the contracting officer requested by letter dated June 24 that Colorado Construction "submit further documentation" demonstrating its eligibility for award as an Indian-owned enterprise. AR, Tab 11, Contracting Officer's Letter to Colorado Construction (June 24, 2002). Colorado Construction responded by letter dated June 26, and after reviewing the information, the contracting officer informed Colorado Construction, by letter dated July 10, that its bid had been rejected because "[t]he documents for Colorado Construction Company provide insufficient evidence that the control and daily management of the company lies with an Indian-owned enterprise."<sup>1</sup> AR, Tabs 13 & 15, Colorado Construction's Response to the Agency's Request (June 26, 2002); Contracting Officer's Letter to Colorado Construction (July 15, 2002). This protest followed.

Colorado Construction argues that the agency's determination that it was ineligible for award was unreasonable. The protester points out that in response to the agency's requests it provided, among other things, evidence that the president of the firm owns 51 percent of the firm's common stock, is an enrolled member of a Native American tribe, and would serve as the superintendent for the project. The protester also notes that "[a]s majority shareholder, [the Native American president of Colorado Construction] would be entitled to a majority of the dividends, if any." Protester's Comments at 6 n.2.

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<sup>1</sup> The record reflects that the agency was satisfied that the president of Colorado Construction, who is an enrolled member of a Native American tribe, met the definition of "Indian" as required.

The Buy Indian Act, 25 U.S.C. § 47, provides as follows:

So far as may be practicable Indian labor shall be employed, and purchases of the products . . . of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

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 be eligible for award under a Buy Indian Act set-aside, and determining whether the information provided by the firm to establish compliance with those criteria, fall within that broad discretion. We will disturb a BIA conclusion regarding a firm's eligibility only where it is shown to be arbitrary, unreasonable, or in violation of law or regulation. Lewis, Oberly, Sloan & Assocs., P.C., B-266164, Jan. 11, 1996, 96-1 CPD ¶ 81 at 2.

The agency rejected Colorado Construction's bid, after considering that firm's submissions, based on its determinations that there was insufficient evidence that the Native American president of Colorado Construction would be involved in the daily management of the enterprise and that he would receive the majority of the earnings of the project, as was required for the firm to be eligible for award. Specifically, the agency concluded that, despite the assertions of the protester, "the control, experience, and financial responsibility appears to be with Canyon Construction Company, a non-Indian entity." Contracting Officer's Statement at 5. This determination was based on a number of factors.

For example, the information submitted by Colorado Construction established that although Colorado Construction had existed for more than 8 years, it had not been "awarded any projects to date," and, with the exception of \$500 cash, had no assets (such as equipment, materials, furniture, or real estate). AR, Tabs 9e & 9f, Colorado Construction's Financial Statement and Completed Experience Questionnaire. The record also evidenced that the initial incorporators and directors of Colorado Construction were not Native Americans (and currently own Canyon Construction), and that the Native American president of Colorado Construction was issued a certificate of stock for 51 percent of the firm's common stock and was designated president of Colorado Construction on March 20, 2002--less than 1 month before bid opening. The remaining 49 percent of the firm's common stock is held by the secretary of Colorado Construction (one of the firm's initial incorporators and directors), and this individual is also an owner of Canyon Construction. AR, Tab 13a, Minutes of Special Meeting of Stockholders of Colorado Construction Corporation; Contracting Officer's Statement at 4.

With regard to the relationship between Colorado Construction and Canyon Construction, the contracting officer also found that although Colorado Construction's bid provided only a post office box and no physical address, the physical address determined to be Colorado Construction's is at a building which bears the name of Canyon Construction (as well as certain other businesses), but not

of Colorado Construction. Contracting Officer's Statement at 2. The contracting officer adds that Colorado Construction's facsimile responses to the agency's queries bear the name and telephone number of Canyon Construction, and that the Agreement of Indemnity issued by Colorado Construction's surety was signed by the owners of Canyon Construction as well as the secretary of Colorado Construction and its Native American president. Contracting Officer's Statement at 4; AR, Tab 3, Agreement of Indemnity.

The contracting officer also found that consistent with Colorado Construction's statement that it had not been awarded any projects, the firm's completed experience questionnaire states, with regard to work performed for cities, counties, states, and the federal government, that in each instance the work had been performed "[u]nder the banner of Canyon Construction." AR, Tab 9f, Colorado Construction's Completed Experience Questionnaire. The questionnaire also stated that the secretary and Native American president of Colorado Construction "are owners and employees of Canyon Construction . . . ." This representation was consistent with the resume of the Native American president of Colorado Construction, which stated that he is currently employed by Canyon Construction.

The contracting officer noted that although Colorado Construction claimed that its Native American president would serve as the "Project Superintendent" and "makes all construction decisions and controls Colorado Construction Corporation," his resume indicated that he had worked on only one bridge construction project, and did not specify what his responsibilities were with regard to that project. Contracting Officer's Statement at 2; AR, Tabs 9, 9h & 13, Colorado Construction's Letter to the Agency (June 14, 2002); Colorado Construction's Letter to the Agency (June 26, 2002). The agency also points out that according to the documents submitted by Colorado Construction, Canyon Construction would "make available personnel for technical consultation and advise as necessary," and that Colorado Construction's non-Native American secretary (and an owner of Canyon Construction) "serves as the office manager which includes payroll, taxes, permits, contracts, subcontracts, hiring, interviews, billings, accounts payable, etc." Contracting Officer's Statement at 3; AR, Tabs 9d & 13, Canyon Construction's Letter to Colorado Construction (June 14, 2002); Colorado Construction's Letter to the Agency (June 26, 2002).

As already noted, BIA has broad discretion to determine the quantum of evidence necessary to establish compliance with the criteria that a firm must meet to be eligible for award under the Buy Indian Act. Although Colorado Construction complies technically with the eligibility criteria established by BIA and thus the Buy Indian Act, we agree with the agency that the record, as detailed above, provided a reasonable basis to doubt whether the Native American president of

Colorado Construction would in fact participate in the daily business management of the enterprise and whether the majority of the earnings from the contract would accrue to the president. American Eagle Indus., Inc.; Yellowhorse, Joint Venture, B-255251; B-255251.2, Feb. 22, 1994, 94-1 CPD ¶ 128 at 6. Thus, we find no basis to object to the rejection of Colorado Construction's bid.

The protest is denied.

Anthony H. Gamboa  
General Counsel