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Comptroller General
of the United States
Washington, D.C. 20548

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Decision

Matter of: C&S Carpentry Services, Inc.

File: B-253615

Date: October 6, 1993

Laurence J. Zielke, Esq., and Charles F. Merz, Esq., Pedley, Ross, Zielke, & Gordinier, for the protester.
Lester Edelman, Esq., and Beth Kelly, Esq., Army Corps of Engineers, for the agency.
Jeanne W. Isrin, Esq., Scott Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably determined that joint venture comprised of a small disadvantaged business (SDB) and a non-SDB was ineligible to receive contract set aside for SDB concerns where, although the joint venture agreement provided the SDB with a 51 percent interest, the SDB would not control management and daily business operations of the project because the non-SDB joint venturer could effectively veto any action by the SDB.

2. Firm must demonstrate status as a small disadvantaged business concern at time of bid opening; post-bid opening amendment to joint venture agreement changing legal relationship of joint venturers is immaterial for purposes of establishing status, since it cannot affect status as of bid opening.

DECISION

C&S Carpentry Services, Inc., a small disadvantaged business (SDB), protests the rejection of a bid submitted on behalf of C&S Carpentry Services, Inc. and Site Development, Inc., a joint venture (C&S/SD), under invitation for bids (IFB) No. DACA27-93-B-0015, issued by the U.S. Army Corps of Engineers for the modernization of two existing barracks at Price Support Center, Illinois. The procurement was set aside for SDBs and the Corps rejected C&S/SD's bid on the ground that the joint venture does not qualify as an SDB.

We deny the protest in part and dismiss it in part.

The agency received three bids at the March 16, 1993, bid opening. C&S/SD was the apparent low bidder. The second low bidder filed an agency-level protest challenging C&S/SD's SDB status. The Corps referred the matter to the Small Business Administration (SBA), but the SBA declined to make a determination, finding that it was a Department of Defense (DOD) responsibility to determine the SDB eligibility of joint venture bidders.[1] On May 25, the Army determined that C&S/SD did not qualify as an SDB based on the joint venture agreement submitted by C&S/SD with its bid. Specifically, the Corps found that much of the joint venture's day-to-day operations and financial activities were controlled by a management committee comprised of two representatives from each firm. The decisions of the management committee could effectively be vetoed by the SD representatives because a unanimous vote of the committee was required for any decision. C&S/SD protested the decision to our Office on May 28. Award has been withheld pending resolution of the protest.

C&S maintains generally that, since it is an SDB and the joint venture agreement gives it a 51 percent interest, the joint venture qualifies as an SDB and should have received award.

Under the DOD's Section 1207[2] SDB set-aside program, the final determination regarding the SDB status of joint ventures is "exclusively a matter for the SBA." Caltech Serv. Corp., B-250784.2; B-250784.3, Feb. 4, 1993, 93-1 CPD ¶ 103. However, the SBA has not issued regulations containing criteria for determining a joint venture's SDB status and currently declines to make such determinations. Id. Accordingly, DOD itself determines the joint venture's SDB status, Beneco Enters., Inc., B-239543.3, June 7, 1991, 91-1 CPD ¶ 545, and we review DOD's determination to assure that it is reasonable. Id.

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[1]The SBA's position is that, since DOD has not established criteria for evaluating the eligibility of joint ventures for SDB set-asides and bid preferences, SBA will not determine whether joint ventures qualify as SDBs. Rather, it will consider only the status of the purported SDB participant in the joint venture.

[2]Section 1207 of the National Defense Authorization Act for Fiscal Year 1987, as amended, 10 U.S.C. § 2323 (Supp. IV 1992), authorizes DOD's SDB set-aside contracts and SDB evaluation preferences. An SDB eligibility protest must be filed with the contracting officer, who then forwards the protest to the SBA for a conclusive determination. Defense Federal Acquisition Regulation Supplement (DFARS) § 219.302.

The agency's determination that C&S did not qualify as an SDB was reasonable. The C&S/SD joint venture agreement provided that C&S would have a 51 percent interest in the joint venture, but this is not sufficient by itself to qualify an SDB/non-SDB joint venture as an SDB concern. The solicitation defined an SDB as a small business that is at least 51 percent owned by 1 or more socially and economically disadvantaged individuals, whose management and daily business operations are controlled by such individuals, who also receive the majority of the entity's earnings. C&S did not meet this standard.

The agency's determination was based on the fact that C&S would not control management and daily operations on the project. The C&S/SD joint venture agreement provided that management and day-to-day operations were to be the responsibility of a management committee which performed vital functions including, for example, the negotiation of subcontracts and purchase orders, the determination of working funds, materials, plant and equipment to be supplied, and the manner of contract performance. As noted, the management committee was to be composed of two representatives from C&S and two from SD, and all decisions had to be made by unanimous vote; this meant that C&S's representatives could not control the project in essential aspects because the SD representatives could always vote against them. In addition, SD was to furnish the performance and payment bonds and start-up financing, project accounting was to be done in accordance with SD's accounting practices, and checks drawn on the entity's joint account required the signature of a representative from each joint venturer.

Where a non-SDB joint venturer provides the initial working capital and bonding, or controls essential administrative and management functions, the fact that the SDB joint venturer holds a majority interest in the enterprise is insufficient for the entity to qualify as an SDB concern. See O.K. Joint Venture, 69 Comp. Gen. 245 (1990), 90-1 CPD ¶ 170; Washington-Structural Venture, 68 Comp. Gen. 593 (1989), 89-2 CPD ¶ 130.

C&S argues that it was never the intent of the joint venturers that SD have veto control over the decisions of the management committee. To reflect this purported intent, C&S/SD amended its joint venture agreement after bid opening; under the revised terms, the management committee is comprised of two representatives from C&S and one from SD, and decisions of the committee are by majority vote. The amended agreement thus provides C&S control over the management committee and, consequently, over both the daily operation of the project, and various other essential business matters. C&S maintains that, based on these revised terms, it should be found eligible for the award.

The amended joint venture agreement has no effect on the validity or reasonableness of the contracting officer's decision. Under DFARS § 219.301, a concern must qualify as an SDB on the date of bid opening and on the date of award to be eligible for an SDB set-aside award. See also Dawkins General Contractors and Supply, Inc., B-243613.11, Sept. 2, 1992, 92-2 CPD ¶ 190. C&S's revision of its joint venture agreement does not change the fact that as of bid opening the C&S/SD joint venture did not qualify as an SDB. The amended agreement thus did not render the firm eligible for the award. See generally Yellowhorse Indus., B-250282, Jan. 12, 1993, 93-1 CPD ¶ 35, aff'd, Yellowhorse Indus.--Recon., B-250282.2, May 24, 1993, 93-1 CPD ¶ 399 (post-bid opening information may be considered only to the extent that it shows the joint venture's status as Indian-owned concern at time of bid opening).

C&S maintains it is immaterial that the joint venture agreement was amended after bid opening since, according to the protester, Illinois law, under which the agreement was executed, permits the retroactive amendment of joint venture agreements.

Our Office looks to state law for guidance only in the absence of controlling federal law. The GR Group, Inc., B-242570, Apr. 29, 1991, 91-1 CPD ¶ 418. Where controlling federal law exists, state law may only be considered where the result would not conflict with federal laws or policies, or otherwise interfere with the exercise of federal powers. See Blue Cross and Blue Shield of Va., B-222485, July 11, 1986, 86-2 CPD ¶ 61. Illinois law, as interpreted by the protester, does not affect the result here. While Illinois law may allow the retroactive amendment of a joint venture agreement, to permit C&S/SD an opportunity to essentially change its legal status after bid opening would be inconsistent with the requirements of DFARS § 219.301 and our cases. Since Illinois law is in conflict with DFARS, it is not controlling; the terms of the amended joint venture agreement thus are immaterial.

Finally, C&S/SD asserts that the second low bidder in the procurement does not qualify as an SDB. The protester is not an interested party to raise this issue under our Bid Protest Regulations. In order to be an interested party, a protester must have a direct economic interest which would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a); S.A. SABER, B-249874, Dec. 10, 1992, 92-2 CPD ¶ 403. Since C&S/SD does not qualify as an SDB, the third-low bidder, and not C&S/SD, would receive the award if its assertion were correct.

C&S/SD therefore is not an interested party to raise the matter. See id.[3]

The protest is denied in part and dismissed in part.

for James F. Hinchman
General Counsel

[3]In its comments on the agency report, C&S asserted for the first time that it has not been established that SD is not also an SDB concern. Since C&S knew or should have known of the SDB status of SD when it filed its initial protest, this argument is untimely and will not be considered. King-Fisher Co., B-250791, Feb. 2, 1993, 93-1 CPD ¶ 94.