



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Arapaho Communications, Inc./Steele & Sons,  
Inc. Joint Venture

**File:** B-255330

**Date:** February 8, 1994

Douglas C. Smith, Esq., Ferrell and Smith, for the  
protester.

Susan P. McNeill, Esq., and Milton D. Watkins, Esq.,  
Department of the Air Force, for the agency.

Tania L. Calhoun, Esq., and Christine S. Melody, Esq.,  
Office of the General Counsel, GAO, participated in the  
preparation of the decision.

### DIGEST

Agency properly determined that joint venture did not  
qualify as a small disadvantaged business (SDB) where agency  
reasonably found that SDB member of joint venture did not  
control the management and daily business operations of the  
activity.

### DECISION

Arapaho Communications, Inc./Steele & Sons, Inc. Joint  
Venture protests the rejection of its bid submitted under  
invitation for bids (IFB) No. F34650-93-B-0064, issued by  
the Department of the Air Force for the replacement of gas  
lines at Tinker Air Force Base, Oklahoma. The procurement  
was set aside for small disadvantaged businesses (SDB), and  
the Air Force rejected the bid on the ground that the joint  
venture between Arapaho, an SDB, and Steele, a non-SDB, did  
not qualify as an SDB.

We deny the protest.

The agency received four bids at the September 20, 1993, bid  
opening, with Arapaho/Steele submitting the apparent low  
bid. On September 22, the contracting officer called the  
telephone number listed on Arapaho/Steele's bid and reached  
Steele's offices in Georgia.<sup>1</sup> She spoke with C.J. Steele,  
Steele's president, and asked that the joint venture verify  
the bid and provide her with a copy of the joint venture

<sup>1</sup>Likewise, the address listed on the bid as the joint  
venture's address is Steele's address.

agreement so the agency could review the joint venture's SDB status. When neither the bid verification nor the joint venture agreement was received, the contracting officer called the same telephone number and asked for Jack Kidd, Arapaho's president, who was listed on the bid as the joint venture's principal representative. The receptionist at Steele's offices gave the contracting officer a Texas telephone number where Mr. Kidd could be reached. Before the contracting officer ended that telephone conversation, she asked the receptionist to identify the SDB partner in the joint venture. The contracting officer states she was told that, while Arapaho was the SDB, "all paperwork would be through Steele." The contracting officer then called the Texas telephone number and reached Arapaho's offices, and, eventually, Mr. Kidd. Mr. Kidd informed the contracting officer that Arapaho was the SDB and controlled 51 percent of the joint venture. The bid verification and joint venture agreement, prepared and executed by Mr. Steele, were subsequently received from the Steele offices.

On September 27, the contracting officer reviewed the joint venture agreement and found that it was too vague to support a determination that the joint venture was sufficient to qualify, without clarification or discussion, as an SDB, using the guidelines of 13 C.F.R. § 124.321 (1993). Specifically, the Air Force found that the joint venture agreement did not make it clear that the joint venture would be controlled by Arapaho, the SDB. The contracting officer was also concerned that the address on the bid, the comment made by Steele's receptionist, and the fact that Steele, not Arapaho, submitted the bid verification and joint venture agreement to the agency, were additional indications that the joint venture might not be controlled by Arapaho. As a result, on September 29, the contracting officer rejected Arapaho/Steele's bid as nonresponsive and awarded the contract to J. Morris and Associates, Inc., the second-low bidder. This protest followed.

Although the final determination regarding the SDB status of joint ventures under the Department of Defense's (DOD) section 1207<sup>2</sup> SDB set-aside program is exclusively a matter for the Small Business Administration (SBA), C&S Carpentry Servs., Inc., B-253615, Oct. 6, 1993, 93-2 CPD ¶ 209, the SBA has not yet issued regulations containing criteria for determining a joint venture's SDB status, as opposed to the SDB status of one of the joint venturers, and currently declines to make such determinations under the DOD program.

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<sup>2</sup>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.

Id.; see also Beneco Enters., Inc., B-239543.3, June 7, 1991, 91-1 CPD ¶ 545. In these circumstances, DOD itself determines the joint venture's SDB status, O.K. Joint Venture, 69 Comp. Gen. 200 (1990), 90-1 CPD ¶ 170; see also Washington-Structural Venture, 68 Comp. Gen. 593 (1989), 89-2 CPD ¶ 130, and we will review DOD's determination to assure that it was reasonable. See, e.g., C&S Carpentry Servs., Inc., supra.

The solicitation incorporated by reference Defense Federal Acquisition Regulation Supplement (DFARS) § 252.219-7000, which defines an SDB as a small business concern, owned and controlled by individuals who are both socially and economically disadvantaged, the majority of earnings of which directly accrue to such individuals. It also incorporated by reference DFARS § 252.219-7002, "Notice of Small Disadvantaged Business Set-Aside," which, in turn, incorporates the SDB definition contained in 13 C.F.R. § 124.602(1): a small business, at least 51 percent owned by one or more socially and economically disadvantaged individuals, whose management and daily business operations are controlled by one or more such individuals.

The contracting officer determined that the joint venture agreement did not clearly grant control to Arapaho, the SDB, over such things as project management and contract performance, and that, as a result, the agency could not determine that the joint venture would meet the SDB standard concerning SDB control of management and daily business operations of the joint venture.<sup>3</sup>

The joint venture agreement provided that the entity would be jointly managed by the two parties. Arapaho would be responsible for project management and all materials, and Steele would be responsible for performance and payment

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<sup>3</sup>In reaching this conclusion, the contracting officer relied on 13 C.F.R. § 124.321, which specifically addresses the prerequisites for a joint venture agreement between a section 8(a) concern and another small business concern for the performance of a section 8(a) contract. Arapaho/Steele argues that the agency's reliance on 13 C.F.R. § 124.321 is misplaced, since that provision does not apply to a procurement where, as here, the joint venture agreement is between an SDB and a non-SDB for the performance of an SDB contract. However, we have approved of the use of SBA's regulations for section 8(a) joint ventures in cases involving SDB joint ventures. O.K. Joint Venture, supra. See also Washington-Structural Venture, supra. While these guidelines are not dispositive, they are indicative of SBA's views on control considerations in joint ventures. Washington-Structural Venture, supra.

bonds, insurance, and all labor for performance of the work. However, the agreement also stated that each party was to furnish all labor required to perform its own respective work, and all matters concerning the hiring and day-to-day supervision of employees or of labor furnished to the joint venture would be the responsibility of the party employing the persons or the supervisory personnel to whom such responsibility was delegated. As all labor for performance of the work was to be provided by Steele, and the joint venture agreement did not indicate that the supervisory personnel were employees of Arapaho, it appeared that all matters concerning the day-to-day supervision of labor would be Steele's responsibility. We agree with the agency that Arapaho, the SDB, cannot be considered solely responsible for the performance and completion of the project if it has no absolute control over the employees and laborers on the job site.

The joint venture agreement also stated that Arapaho would maintain the joint venture's administrative records, and would be responsible for coordinating all administrative functions required by the project. The contracting officer found that these provisions were inconsistent with the fact that the bid listed Steele's address as the joint venture's address; Steele was the party that provided the agency with the bid verification and joint venture agreement; and Steele's receptionist stated that the paperwork would "go through Steele."<sup>4</sup> Further, the joint venture agreement makes Steele responsible for keeping the joint venture books of account for expenses and revenues, and for utilizing its accounting equipment and systems for the project. Where a non-SDB joint venturer 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.<sup>5</sup> Id.; see 13 C.F.R. § 124.321; O.K Joint Venture, supra; Washington-Structural Venture, supra.

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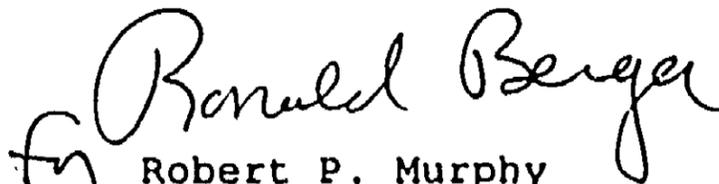
<sup>4</sup>The protester does not dispute or explain this statement.

<sup>5</sup>The agency was also unable to determine the initial capital contributions of the parties. The joint venture agreement merely states that the initial capital contribution of each party "shall be made in the amount agreed after consultation between the parties"; it does not identify that amount. This unanswered question, along with Steele's furnishing of the performance and payment bonds, and Steele's utilization of its accounting equipment and systems for the project, is another measure of the uncertainty that Arapaho would exercise control over the joint venture. See C&S Carpentry Servs., Inc., supra; Washington-Structural Venture, supra.

In response to the agency report, the protester primarily argues that the agency improperly relied solely upon the joint venture agreement, and was required to look elsewhere for indications that the joint venture was an SDB. The record shows that, while the agency's primary consideration was the joint venture agreement, the contracting officer also considered the fact that the contact point listed on the bid was Steele, the bid verification was prepared and executed by Steele, and the joint venture agreement was provided by Steele. Since the combination of these factors indicates that Steele might control more than 50 percent of the joint venture, we agree that the agency's exclusion of the joint venture for SDB status was proper.

Although Arapaho/Steele seems to contend that it should have been given the opportunity to explain or clarify its agreement, we note that notwithstanding its awareness of those aspects of its agreement that the agency considered vague or unacceptable, in availing itself of the opportunity to clarify its agreement here Arapaho/Steele has not suggested any changes or clarifications. Instead, it contends that its agreement is sufficient on its face and the agency has improperly relied upon 13 C.F.R. § 124.321. Under these circumstances, we do not perceive that the protester suffered any prejudice from the review process. See Washington-Structural Venture, supra.

The protest is denied.

  
fn Robert P. Murphy  
Acting General Counsel