



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

102212

## Decision

**Matter of:** D.H. Kim Enterprises, Inc.  
**File:** B-255199.2; B-255199.3  
**Date:** February 24, 1994

Thomas W. Vassar, Esq., Jung & Vassar, P.C., for the protester.  
Joseph M. Goldstein, Esq., Department of the Air Force, for the agency.  
Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Under a solicitation set aside for small disadvantaged business (SDB) concerns, where the non-SDB and SDB participants of a joint venture have an "equal voice" in the management of the joint venture and must specifically agree to the management powers and duties to be delegated the SDB managing party, the SDB participant does not have the requisite legal or management control over the enterprise; where the SDB participant lacks such management control, the fact that the SDB joint venturer holds a majority interest or receives a majority of profits of the enterprise is insufficient for the entity to qualify as an SDB concern.

### DECISION

D.H. Kim Enterprises, Inc., a small disadvantaged business (SDB), protests the Department of the Air Force's award of a construction contract to Team Ace Joint Venture, comprised of Team Contracting, Inc. and American Construction & Energy, Inc. The contract was awarded under invitation for bids (IFB) No. F49642-93-B-A117, which was issued as an SDB set-aside pursuant to Section 1207 of the Defense Authorization Act for Fiscal Year 1987, as amended, 10 U.S.C. § 2323 (Supp. IV 1992).<sup>1</sup> Team Contracting is an SDB; American Construction is a small business, but not an SDB. Kim protests that Team Ace Joint Venture should not have qualified as an SDB concern.

<sup>1</sup>The Act provides that the Department of Defense (DOD) will attempt to award 5 percent of all contracts to SDB concerns and defines SDB concerns by reference to Section 8(d) of the Small Business Act.

We sustain the protest.

The IFB was issued on August 19, 1993, for the replacement of kitchens in military family housing at Andrews Air Force Base, Maryland. On September 20, eight bids were received. The low bidder was allowed to withdraw its bid. The Team Ace Joint Venture, which self-certified itself as an SDB, submitted the second low bid of \$489,817, and Kim submitted the third low bid of \$510,000. On September 30, the agency awarded the contract to Team Ace Joint Venture. This protest followed. After the agency received a copy of the protest, it requested additional information from the joint venture, including a copy of the joint venture agreement. After reviewing this agreement, the contracting officer determined that Team Ace Joint Venture did qualify as an SDB based on the following findings: (1) Team Contracting would receive 56 percent of the profits and bear 56 percent of the losses; (2) Team Contracting was designated as the managing party; (3) Team Contracting would be responsible for maintaining the books of account of the joint venture and for forwarding statements and reports; (4) Team Contracting qualifies as a small business under the size standards and is owned by a socially disadvantaged individual; and (5) Team Ace Joint Venture certified in its bid that it was an SDB. The agency's position is that it properly qualified Team Ace Joint Venture as an SDB concern.

Kim maintains that the contracting officer's determination that the joint venture qualifies as an SDB was based on a superficial reading of the joint venture agreement; that the SDB firm, Team Contracting, is not a "viable" firm and does not have control of the management of the joint venture; that Team Contracting is a "front" for American Construction; that the joint venture was not formed for a specific business venture but is an ongoing and permanent business relationship between Team Contracting and American Construction; and that the joint venture's SDB status is undermined by a provision in the joint venture agreement that permits the percentage of profit accruing to the SDB firm to become "defeasible" under certain circumstances.

Under the DOD Section 1207 SDB set-aside program, the final determination regarding the SDB status of joint ventures is "exclusively a matter for the [Small Business Administration (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.<sup>2</sup> 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.

The IFB here defined an SDB as a small business that is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged. The solicitation further provided that the concern's management and daily business operations must be "controlled by one or more of such individuals" and that the majority of earnings must directly accrue to the disadvantaged owners.

We have reviewed the joint venture agreement and conclude that Team Contracting, the SDB participant in the joint venture, does not legally have control of the management of the joint venture as reflected in the specific terms of the agreement. Paragraph 12 of the joint venture agreement states as follows:

"Each party shall have an equal voice in the management of the Joint Venture, and the parties shall agree from time to time on the methods and manner of performance of the Contract and on the management powers and duties to be delegated to the managing party . . . . Subject to the foregoing, the managing party shall be Team Contracting, Inc." [Emphasis supplied.]

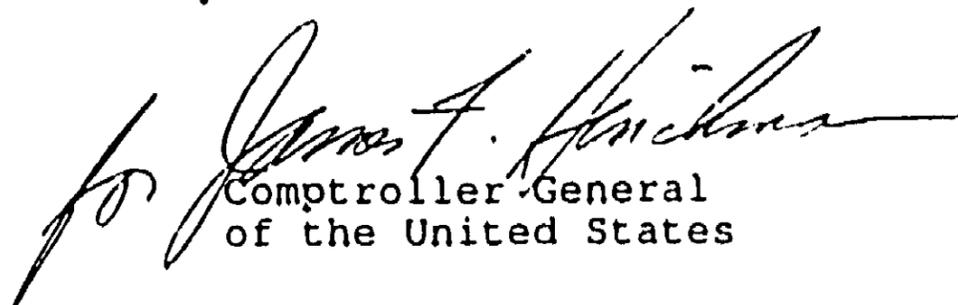
We think it is obvious that where the non-SDB and SDB concerns have an "equal voice" in the management of the joint venture, and must specifically agree to the management powers and duties to be delegated the SDB managing party, the SDB participant fails to have legal control over the enterprise. See C&S Carpentry Servs., Inc., B-253615, Oct. 6, 1993, 93-2 CPD ¶ 209 (SDB firm lacked control where management of venture was controlled by a management committee equally split between SDB and non-SDB representatives). Where the SDB participant lacks management control, the fact that the SDB joint venturer holds a majority interest or receives a majority of profits of the enterprise is insufficient for the entity to qualify as an SDB concern. See id.

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<sup>2</sup>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.

We recommend that the agency terminate for convenience the contract awarded to Team Ace Joint Venture and award the contract to Kim, the next low SDB concern, if otherwise appropriate. We find that the protester is entitled to the cost of filing and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1993). In accordance with 4 C.F.R. § 21.6(f), the protester's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

  
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