Jordan

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Washington-Structural Venture

File: B-235270

Date: August 11, 1989

DIGEST

1. Agency properly determined that joint venture protester did not qualify as a small disadvantaged business (SDB) where agency reasonably found that SDB member of joint venture did not control at least 51 percent of venture as evidenced by the non-SDB member's provision of financial resources; greater obligation for losses and liabilities; provision of the project manager empowered to resolve disputes between the venturers; and other indicia of majority control.

2. In the absence of any evidence of bad faith, awardee's bid is responsive when listing only itself in the small disadvantaged business self-certification and as principal on the bid bond even though awardee's teaming agreement with another concern is interpreted by protester as creating a joint venture.

3. Agency properly determined that awardee qualified as small disadvantaged business (SDB) where it reasonably found that awardee, though teamed with a non-disadvantaged small business, met the small size requirements; retained control of its management and daily business; was solely responsible for contract performance and all contacts with the agency; and would receive 100 percent of the contract profits.

DECISION

Washington-Structural Venture (WSV) protests the award of a contract under invitation for bids (IFB) No. DACA51-89-B-0017 to Abrantes Construction Corporation. The IFB, issued by the Army Corps of Engineers, was a 100 percent small disadvantaged business (SDB) set-aside for construction of the Post Safety and Law Enforcement Building at Fort Drum, New York. WSV, a joint venture between F.J. Washington Construction, Inc., an SDB, and Structural Associates, Inc., a non-SDB, contends that it qualifies as the low SDB bidder

and that Abrantes does not qualify as an SDB because of Abrantes' teaming agreement with a subcontractor, Northland Associates, Inc.

We deny the protest.

Four bids were opened on February 14, 1989, with WSV submitting the second low bid and Abrantes submitting the third low bid. By letter of February 16, WSV successfully challenged the low bidder as not qualifying as an SDB. The contracting officer then obtained and reviewed a copy of WSV's joint venture agreement. This review, as well as Washington's apparent lack of financial capability, raised questions of WSV's qualification as an SDB and led the contracting officer to refer the matter to the Small Business Administration (SBA), which has the general responsibility for determining the SDB status of a firm when that status is questioned. The contracting officer's referral did not question Washington's SDB status or Structural's size status, but detailed the Corps' rationale for finding that the joint venture did not qualify as an SDB.

By letter of March 24, 1989, the SBA declined to determine the joint venture's SDB status, explaining:

> "In the instance of a Joint Venture, it is the policy of the [SBA] . . . that determination of SDB status will be limited to the SDB participant in the Joint Venture. In this regard, it is the responsibility of [DOD] . . . to determine the eligibility of Joint Venture organizations for SDB program participation."

In light of the SBA's response, the contracting officer again reviewed WSV's joint venture agreement. On April 12, 1989, he determined that WSV was not an SDB because its management and daily business would be controlled by the non-SDB member of the venture and rejected its bid as nonresponsive. Concurrent with his review of WSV, the contracting officer also reviewed the teaming agreement between the next low bidder, Abrantes, and Northland.

Even though the Abrantes/Northland teaming agreement disclaimed any relationship (e.g., joint venture) between the firms, apart from that of contractor-subcontractor, the contracting officer reviewed the concerns' relationship to determine whether Abrantes qualified as an SDB. After observing that the concerns' combined earnings were within the appropriate size limits for an SDB and that under the

terms of the agreement, Abrantes, the SDB, was not being controlled by Northland, the non-SDB, the contracting officer determined that Abrantes qualified as an SDB. By letter dated April 14, received April 19, WSV was notified of the award to Abrantes. Also on or about April 19, WSV learned of Abrantes' teaming agreement. On April 19, WSV protested the determination of its nonresponsiveness to the agency and filed the same protest with our Office on April 21. On April 27, WSV protested Abrantes' SDB status to the agency and our Office.

As a preliminary matter, the Corps urges us to dismiss the protest because WSV's bid expired prior to the filing of the protest with the agency and our Office. As such, WSV allegedly is not an interested party because it does not have a direct economic interest which would be affected by award or failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1988). We disagree. On April 10, 2 days prior to rejecting WSV's bid as nonresponsive, the Corps advised WSV that an award was not anticipated in the near future, but did not request an extension of its bid as Federal Acquisition Regulation (FAR) § 14.404-1(d) (FAC 84-5) suggests it should have done. The Corps rejected WSV's bid and awarded the contract to Abrantes on Friday, April 14, prior to the expiration of WSV's bid on Sunday, April 16. When WSV learned on April 17 that award had been made to Abrantes, it immediately expressed disagreement and filed a protest 2 days later. The essence of WSV's protest is that when award was made on April 14, it should have been made to WSV. Since the basis of WSV's protest, rejection of its bid and award to Abrantes, transpired prior to the expiration of its bid, and since WSV protested as soon as it learned of that basis, under the circumstances of this case we think WSV's conduct effectively served to extend its bid. See Microtech, Inc., B-225892, Apr. 29, 1987, 87-1 CPD ¶ 453 (pursuit of award through bid protest is indicative of intent to extend bid).1/ Thus, we conclude that WSV is an interested party.

On the merits, WSV first contends that it is entitled to the contract because it certified in its bid that it was an SDB and only the SBA can determine that it is not entitled to SDB status. WSV argues that since the SBA declined to make that determination and the Corps did not appeal the SBA's dismissal of the referral, WSV's self-certification as an SDB must be controlling.

1/ WSV subsequently expressly extended its bid in writing.

The Corps and the awardee agree that the SBA has the authority to determine SDB status, but rely on the SBA's advice that it was the responsibility of the Department of Defense (DOD) to make the determination of eligibility as making the Corps' determination of WSV's status the final word on the subject. The SBA, whose views we solicited, maintains that since the SDB set-aside is administered under a statute pertaining to DOD (section 1207 of Pub. L. No. 99-661) it is DOD which must first determine whether (and if so, under what criteria) a joint venture may be eligible for SDB status before the SBA will render an official determination.

In general, both DOD's SDB preference regulations and more recent SBA regulations provide for the referral of SDB status questions to SBA for resolution. See DOD FAR Supplement (DFARS) § 219.302(5) (1988 ed.); 54 Fed. Reg. 10,271 at 10,273 (1989) effective March 13, 1989 (to be codified at 13 C.F.R. § 124.604). However, it is clear from the record in this case that there is some question between DOD and SBA with regard to the extent of SBA's role when a joint venture is involved. Further, it is clear that SBA has decided not be make any determination in this case and has left the matter in the hands of DOD (here, the Corps). Since the SDB set-aside program is a DOD program, we see nothing improper under these circumstances with the Corps' deciding whether the joint venture was eligible for an SDB set-aside award.2/ In this regard, we have recognized DOD's discretion in establishing regulations and procedures necessary to establish the objectives of the section 1207 SDB preference program, and that when it does so it is not locked into how other agencies such as the Department of Labor traditionally have administered such things as the regular dealer requirement of the Walsh-Healey Act. See MIA Creative Foods, Inc., B-233940, Mar. 28, 1989, 89-1 CPD ¶ 318; G&D Foods, Inc., B-233511 et al., Feb. 7, 1989, 89-1 CPD ¶ 125.

With this in mind, we have reviewed the Corps' reasoning, and in the absence of specific regulations on the subject, we find that the Corps reasonably relied on existing

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2/ Under the Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, § 201(E), (F)(vii), one responsibility of a new SBA division is to decide protests regarding whether a concern is "disadvantaged" for purposes of programs which would include DOD's section 1207 SDB program. However, this law, effective August 15, 1989, was not in effect at the time SBA declined to make a determination of SDB status in this case.

authority in determining that WSV did not qualify as an SDB. The Corps looked primarily to the definition of an SDB in DFARS § 219.001: "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," and to the definition of an SDB in section 8(a) of the Small Business Act, 15 U.S.C. § 637(a)(4)(A),(B) (1982): "51 percentum owned by . . . socially and economically disadvantaged individuals . . . [and whose] management and daily business operations . . . are controlled by one or more [of such individuals]." The Corps also reviewed the SBA's guidance on section 8(a) joint ventures, provided to WSV at a March 1988 meeting, for general principles.

The Corps relied upon a number of factors for determining that the SDB concern, Washington, did not control at least 51 percent of the joint venture. Notwithstanding WSV's arguments to the contrary, we find four factors most persuasive. First, Washington lacks the financial capability to obtain necessary payment and performance bonds, funds to handle the contract's financial commitments, and the experience to perform the contract. While we agree with WSV that the lack of bonding, financial, or technical resources may be valid reasons for creation of a joint venture under the SBA's section 8(a) guidelines, we cannot agree that the Corps was unreasonable in concluding that the apparent extent of Structural's provision of such resources indicated majority control over the joint venture by Structural.

Second, although Washington would receive 51 percent of the profits, its obligation to contribute capital is limited to $25,000, while Structural's obligation is open-ended. Further, with regard to losses and liabilities of the joint venture, Washington was responsible only for $25,000, with Structural responsible for any remainder. WSV disputes the Corps' apparent conclusion that Washington does not own 51 percent of the joint venture since, under New York law, there is no requirement for the sharing of losses in the same proportion as profits in order for there to be a valid joint venture. See Mariani v. Summers, 3 Misc. 2d 534, 52 N.Y.S. 2d 750 (Sup. Ct. 1944), aff'd, 269 App. Div. 840, 56 N.Y.S. 2d 537 (1945). While true, that decision also holds that there is a presumption of equally shared losses only in the absence of an agreement fixing a different ratio. Id. Where, as here, the venturers are liable for losses and liabilities up to their original 50-50 investment, and then the non-SDB member is liable for all losses and liabilities above that point, it was reasonable for the Corps to conclude that such an arrangement indicates more than 50 percent control in the non-SDB member.

Third, Structural would provide the project manager who would resolve any disagreement, deadlock, or dispute between the joint venturers as well as be responsible for various duties, indicating at least 51 percent control of the joint venture's business by Structural. The project manager's duties included coordination of contract work; handling of all payment requests to the government; establishing and operating the administrative functions of the joint venture including payroll; and the power to execute and deliver various agreements, subcontracts, etc., to obligate the joint venture as necessary to perform the contract. While WSV argues that Washington's provision of the project superintendent--empowered to generally direct and supervise construction, supervise the contract work, and handle labor matters including employment and discharge of employees--demonstrates its control of 51 percent of the daily management of the joint venture, we find reasonable the Corps' conclusion that Structural would be more in control of the joint venture's business than would Washington.

Fourth, we agree that Structural's greater control is indicated by the maintenance of all accounting, payroll, general office procedures, books, and records in Structural's office, as well as Structural's option to subcontract up to 80 percent of the contract while Washington is required only to perform 10 percent of the contract with its own labor force. While WSV explains that Structural's offices are closer to Fort Drum than are Washington's, we note, as did the Corps, that the SBA section 8(a) guidelines call for the section 8(a) concern to maintain all administrative records in its offices and to perform a minimum of 15 percent of the contract with its own labor. Although these guidelines are not dispositive, they are indicative of SBA's views on control considerations in joint ventures.

Since the combination of the above factors indicate that Structural would control more than 51 percent of the joint venture, we agree that the Corps' exclusion of WSV as ineligible for SDB status was proper. WSV, however, contends that it was treated unfairly because it was not notified of the contracting officer's protest of its SDB status and, unlike Abrantes, it was not provided an opportunity to clarify or explain the terms of its joint venture agreement.

Although WSV did not have a formal opportunity to explain or clarify its joint venture agreement during the Corps' review, it has had the opportunity to make its arguments in conjunction with this bid protest. However, having been

afforded the opportunity to clarify its agreement, WSV has failed to carry its burden to show the decision to reject its bid was incorrect. Our review of the record indicates that the Corps carefully and reasonably interpreted the agreement in determining which joint venturer exercised greater control. Thus, we do not believe WSV was prejudiced by the lack of notice.

Similarly, we do not find that WSV was prejudiced by the review process. WSV bases its claim on the contracting officer's consideration of certain clarifications by Abrantes of its teaming agreement. In a letter dated April 14, the award date, Abrantes made clear that as prime contractor it would provide the project manager; explained in more detail the workings of its joint bank account with Northland; and made plain that Abrantes was entitled to all profit under the contract. We have reviewed the agreement and the letter and find that the letter merely clarified matters already included in the agreement.

Although WSV argues that it should have been given the opportunity to explain or clarify its agreement as was Abrantes, it appears doubtful WSV would have submitted any such clarifications. Notwithstanding its awareness of those aspects of its agreement that the Corps considered weak or unacceptable, in availing itself of the opportunity to clarify its agreement here, WSV has not suggested any changes or clarifications. Instead, it contends that its agreement is sufficient on its face and the Corps has incorrectly applied the relevant standards. Under these circumstances we do not find that Abrantes obtained any unfair advantage by having the opportunity to clarify its agreement and thus we perceive no harm to WSV from the failure to obtain clarifications from it.

WSV also raises a number of reasons why Abrantes is not entitled to award of the contract. WSV first argues that Abrantes and Northland are a joint venture, notwithstanding their agreement's disclaimer to the contrary, and as such, the sole listing of Abrantes on the SDB self-certification constitutes a "substantive error" making the bid nonresponsive. Similarly, WSV urges that the listing of Abrantes on the bid bond is deficient because the "nominal bidder" is a joint venture. We disagree.

A small business self-certification relates only to a concern's status and eligibility for award and does not reflect on the bidder's commitment to provide the services required by the IFB. Thus, any error in a self-certification is not a matter of responsiveness. Lioncrest Ltd., Inc., B-221026, Feb. 6, 1986, 86-1 CPD ¶ 139.

Assuming, for the sake of argument, that Abrante's agreement with Northland created a joint venture, Abrantes' self-certification appears to have been made in good faith. While Abrantes considers itself in a prime/subcontractor relationship with Northland, and thus certified itself alone, it is clear that Abrantes made no effort to hide its relationship with Northland, having submitted a copy of the teaming agreement with its bid. We find insufficient evidence in the record to show that Abrantes' certification, if mistaken, was made in other than good faith and find WSV's contentions insufficient as a basis for questioning the award. Conversational Voice Technologies Corp., B-224255, Feb. 17, 1987, 87-1 CPD ¶ 169.

With regard to Abrantes' listing of itself as the principal on the bid bond, we also find no basis to question the award. As WSV correctly notes, a bid bond which names a principal different from the nominal bidder is deficient and that defect may not be waived. C.W.C. Assocs., Inc, and Chianelli Contracting Co., B-232764, Dec. 21, 1988, 88-2 CPD ¶ 612. However, here, the nominal bidder, Abrantes, also is the principal listed on the bid bond. The fact that WSV interprets Abrantes' and Northland's relationship as a joint venture does not make it one, or create a discrepancy between the bid and the bid bond.

WSV next claims that Abrantes improperly amended its bid by amending its teaming agreement. The substance of the amendment was contained in Abrantes' April 14 clarification letter and provides details on the operation of the concerns' joint bank account. The amendment, executed on April 14, was not solicited by the Corps and was not disclosed to it until after award. Thus, the amendment had no bearing on the award decision. We do not find this clarifying amendment to a business agreement between two concerns to have any effect on bid responsiveness. The amendment was consistent with the original agreement and did not change the concerns' relationship or the performance of the contract. Therefore, we find nothing objectionable in the concerns' amending their agreement.

Finally, WSV contends that as an alleged joint venture, Abrantes and Northland do not qualify as an SDB, because the teaming agreement does not comply with applicable regulations. We have reviewed the agreement between Abrantes and Northland and the Corps' analysis of the agreement and find that the Corps reasonably found Abrantes retained majority control in its teaming with Northland.

The Corps first determined that even if Abrantes and Northland were considered affiliated, their combined annual

earnings still would fall within the appropriate size standard. Next, the Corps found that under the express terms of the teaming agreement it was clear that the management and daily business of Abrantes would be controlled by Abrantes. Abrantes would execute the contract by itself and be solely responsible for contract performance, as well as responsible for all contacts and contract negotiations with the Corps. Also, Abrantes would provide the project manager who would be responsible solely to Abrantes, and any disputes between the concerns would be resolved by arbitration at Abrantes' offices.

Further, in accordance with section 8(a) guidelines, Abrantes and Northland would open a joint bank account, to which all contract earnings would be assigned. Northland would only receive funds in accordance with the amount of its subcontract while Abrantes, who would perform approximately 30 percent of the contract, would receive all remaining funds, including 100 percent of the project profits.

WSV argues that payments for Northland's subcontract work can be adjusted to what the parties believe is a fair share, thus, calling into question whether Abrantes would receive at least 51 percent of the profits. WSV further contends that provisions of the agreement establishing Abrantes' inability to obtain bonding by itself; requiring Abrantes to consult with and obtain Northland's concurrence on material modifications and contract changes; and that Northland countersign joint bank account checks, indicate that Northland is in control. We do not find that Northland's assistance in obtaining bonding or WSV's speculation on how Abrantes and Northland might operate under their agreement is sufficient to question the contracting officer's reasonable determination of Abrantes' control.

Accordingly, the protest is denied.

James F. Hinchman
General Counsel