Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: O.K. Joint Venture

File: B-237328

Date: February 9, 1990

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David R. Kohler, Esq., Office of the General Counsel, for the Small Business Administration.
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DIGEST

Agency properly rejected joint venture under small disadvantaged business (SDB) set-aside where agency reasonably determined that SDB member of joint venture did not control at least 51 percent of venture as evidenced by the SDB member's lack of the financial capability to obtain necessary bonds, lack of funds to handle its financial commitments, lack of experience and technical resources to handle its portion of the contract, and the non-SDB member's maintenance of all record keeping for the venture.

DECISION

O.K. Joint Venture protests the award of a construction contract under invitation for bids (IFB) No. DACA45-89-B-0144 to Peter and Rangel Construction Services, Inc. (P&R). The IFB was issued by the Army Corps of Engineers as a 100 percent small disadvantaged business (SDB) set-aside, for construction of the Strategic Warfare Operations Center at Ellsworth Air Force Base, South Dakota. O.K., a joint venture between O'Bryan Construction Company, an SDB, and Dean Kurtz Construction Co., Inc., a non-SDB, contends that it was improperly rejected as a non-SDB, and should have been awarded the contract as the low bidder.

We deny the protest.

Four bids were opened on August 18, 1989. O.K. submitted the low bid of $3,475,575 and P&R submitted the second low bid of $3,564,000. P&R protested to the contracting activity that O.K. did not qualify as an SDB under the guidelines set forth in the IFB. The contracting officer referred the matter to the Small Business Administration (SBA), which has the general responsibility for finally determining questioned SDB status.

By letter of August 30, the SBA dismissed P&R's protest, explaining it was the SBA's policy that determination of SDB status would be limited to the SDB participant in the joint venture. The SBA also stated that it was the responsibility of the Department of Defense (DOD) to determine the eligibility of joint-venture organizations for participation in the SDB program.

After receiving the SBA's response, the contracting officer requested a copy of O.K.'s joint venture agreement in order to review its SDB status. On September 8, O.K. furnished a copy of the agreement, also dated September 8. O.K. also advised that it intended to amend the agreement to provide that each member of the venture would contribute $10,000 in working capital, instead of the existing provision for Kurtz to furnish all working capital up to $20,000. In addition to reviewing the agreement, the contracting officer checked several of O'Bryan's references with regard to its capacity to perform its requisite share of the work, and reviewed O'Bryan's most recent financial reports, current equipment schedule, and its qualification statement.

Based on this review, the contracting officer concluded that O.K. did not qualify as an SDB because O'Bryan did not have at least 51 percent control. The contracting officer rejected O.K.'s bid and awarded the contract to P&R. O.K. then filed this protest with our Office.

O.K. first contends that it is entitled to the contract on the basis of SBA's dismissal, because the SBA has exclusive jurisdiction to decide protests regarding whether a concern is "disadvantaged" for purposes of programs including DOD's SDB program (section 1207 of the 1987 Defense Authorization Act, Pub. L. No. 99-661). See Business Opportunity Development Reform Act of 1988, Pub. L. No. D100-656, §§ 201(E), 201(F),(vii). The SBA declined to consider the joint venture's legal eligibility on the basis that a statutory interpretation was required by the agency which has authority to implement the statute, here DOD.

Subsequently the SBA received a letter from the Office of the Under Secretary of Defense for Acquisition, dated

November 14, 1989, which states in pertinent part that "DoD has determined as a matter of policy, joint ventures are permissible under the section 1207 program." In view of this letter, in which DOD requested SBA to develop joint-venture criteria for purposes of the section 1207 program, final determination of SDB status with regard to joint ventures is now exclusively a matter for the SBA. However, since at the time of the SBA's dismissal of P&R's appeal, the matter of joint venture eligibility was unresolved, and SBA declined jurisdiction, it was not inappropriate for the contracting agency to review and determine O.K.'s SDB status. See Washington-Structural Venture, 68 Comp. Gen. 594, (1989), 89-2 CPD ¶ 130.

We find that the Corps reasonably determined that O.K. did not qualify as an SDB, based primarily on the definitions of an SDB which were summarized in the IFB. In particular, the IFB defined an SDB as a small business concern owned and controlled by individuals who are both socially and economically disadvantaged, in which the majority of earnings directly accrue to such individuals. Further, an SDB must be at least 51 percent owned by one or more socially and economically disadvantaged individuals, and its management and daily business operations must be controlled by one or more such individuals.

The Corps relied upon a number of factors for determining that the SDB concern, O'Bryan, did not control at least 51 percent of the joint venture. The Corps observed that O'Bryan had a bonding capability of only $750,000 per job, a net worth of less than $105,000, current assets of less than $137,000, and that the premiums on necessary payment and performance bonds, to be obtained by Kurtz, would exceed $23,000. From this the Corps concluded that O'Bryan lacked the financial capability to obtain the necessary bonds. In fact, the joint venture agreement provides for Kurtz to provide "bonding and accounting resources for purposes of completing the contract for which he will be paid by the Joint Venture." The Corps also was aware that O'Bryan possessed limited construction equipment and that its three construction projects since 1985 have been considerably smaller and less complex than the $3.6 million project under the instant procurement. From this combination of factors, the Corps concluded that O'Bryan lacked sufficient funds to handle the contract's financial commitments and the experience necessary to perform the contract.

In this regard, while the joint venture agreement provides for the parties to each furnish $10,000 in working capital, the original agreement called for Kurtz to provide all working capital. Further, although net profits and losses

are to be shared 51 percent by O'Bryan and 49 percent by Kurtz, the provision on working capital requires that all working capital advanced is to be repaid to the advancing party prior to distribution of profits. In view of O'Bryan's limited assets, it is likely that future advances of working capital will come primarily, if not exclusively, from Kurtz, casting additional doubt on O'Bryan's 51 percent control.

The protester contends that the lack of bonding, financial, and technical resources are valid reasons for creation of a joint venture and that O'Bryan is capable of paying the bond premiums. While this may be correct, we find the Corps was not unreasonable in concluding that the apparent extent of Kurtz's provision of such resources indicated majority control over the joint venture by Kurtz. Washington-Structural Venture, 68 Comp. Gen. 594, supra.

The Corps also found that Kurtz's majority control was indicated by provisions for accounting by, and maintenance of all books and records at, Kurtz's office. Although O.K. argues that this arrangement simply reflects the fact that Kurtz's office is closer to the construction site than O'Bryan's, SBA regulations for section 8(a) joint ventures require that the section 8(a) concern maintain all administrative records in its offices unless approved otherwise. See 54 Fed. Reg. 34,692 at 34,740 (1989) (to be codified at 13 C.F.R. § 124.321(d)(3)). Thus, as in Washington-Structural Venture, we agree with the Corps' conclusion that accounting and maintenance of records indicates greater control by the non-SDB concern.

The Corps also questioned whether O'Bryan was capable of performing at least 15 percent of the project with its own labor force as required by the section 8(a) regulations. 54 Fed. Reg. 34,692 at 34,737, 34,740 (1989) (to be codified at 13 C.F.R. § 124.321(d)(3)). This was based on O'Bryan's limited financial capability, general lack of equipment, and the assessment of another government agency, in rejecting O'Bryan's bid in a separate procurement, that O'Bryan lacked the experience and resources to perform 15 percent of a $200,000 contract. O.K. argues that each venturer will furnish 50 percent of the necessary work force and notes that the $200,000 contract was unique, involving construction of an incinerator, and that the project was awarded to a contractor with specialized experience.

We find the Corps' conclusions reasonable under the circumstances. Although the $200,000 contract may have been awarded to a contractor based in part on its specialized experience, the agency which rejected O'Bryan did not base

its rejection on special experience. Rather, that agency is of the opinion that O'Bryan should not be considered for any project over $200,000. Further, we note that the joint venture agreement provides that O.K. will perform no less than 20 percent of the contract, subcontracting the rest. Thus, if the venturers split only 20 percent of contract, O'Bryan would not meet the 15 percent requirement.

We find that based on the combination of factors cited above, the Corps was not unreasonable in concluding that O'Bryan did not exercise majority control over the joint venture. Accordingly, the Corps properly rejected O.K.'s bid and awarded the contract to the second-low bidder.

The protest is denied.

James F. Hinchman
General Counsel