



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

*Wolcott*

## Decision

**Matter of:** SamCorp General Contractors  
**File:** B-241740  
**Date:** February 21, 1991

---

Steven M. Sambrano for the protester.  
Lester Edelman, Esq., Department of the Army, for the agency.  
Glenn G. Wolcott, Esq., and John F. Mitchell, Esq., GAO,  
participated in the preparation of the decision.

---

### DIGEST

Agency reasonably determined that joint venture comprised of a small disadvantaged business (SDB) and a non-SDB was eligible to receive contract set-aside for SDB concerns where the parties demonstrated the joint venture was not controlled by the non-SDB member.

---

### DECISION

SamCorp General Contractors protests the Department of the Army's award of a construction contract to a joint venture comprised of American Eagle Industries (AEI) and Consolidated Construction, Inc. (CCI). The contract was awarded under invitation for bids (IFB) No. DACA47-90-B-0020, which was issued as a set-aside for small disadvantaged business (SDB) concerns pursuant to section 1207 of the Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3973 (1986) (hereinafter referred to as the "section 1207 program").<sup>1/</sup> AEI is an SDB; CCI is a small business, but not an SDB. SamCorp protests that the AEI/CCI joint venture should not have qualified as an SDB concern.

We deny the protest.

---

<sup>1/</sup> As amended, this law provides that the Department of Defense 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.

050660/143220

## BACKGROUND

The IFB was issued by the Army's Corps of Engineers on July 27, 1990, and sought construction of an aircraft maintenance facility and shop service center at Cannon Air Force Base, New Mexico. On September 6, four bids were received and publicly opened. The AEI/CCI joint venture submitted the low bid of \$3,366,000 and SamCorp submitted the second low bid of \$3,405,291. On September 10, SamCorp protested to the contracting officer asserting that the AEI/CCI joint venture should not qualify as an SDB concern because CCI, the non-SDB member, was providing the bonding for the project thereby exercising improper control over the joint venture. The contracting officer referred the matter to the Small Business Administration (SBA) for a determination regarding the SDB status of the AEI/CCI joint venture.

By letter dated September 24, 1990, the SBA dismissed SamCorp's protest stating that it was SBA's policy to make SDB status determinations only for individual members of joint ventures.<sup>2/</sup> The SBA concluded that it was the responsibility of the Department of Defense (DOD) to determine the eligibility of joint venture organizations for purposes of participating in DOD's section 1207 program.

## RESPONSIBILITY FOR SDB DETERMINATION

Under the Small Business Act, the Small Business Administration (SBA) is responsible for determining whether a firm is small or disadvantaged. See 15 U.S.C. § 637(d); Arbor Landscaping, Inc., B-231515, June 13, 1988, 88-1 CPD ¶ 564. This responsibility was clarified when Congress enacted the Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, which established the Division of Program Certification and Eligibility within the SBA and in section 201(a)(F)(vii) specifically provided that this Division is to:

"decide protests regarding the status of a concern as a disadvantaged concern for purposes of any program or activity conducted under the authority . . . of Federal law that references [section 8(d) of the Small Business Act] for a definition of program eligibility . . . ."

---

<sup>2/</sup> AEI's status as an SDB concern has not been challenged.

Following enactment of the Business Opportunity Development Reform Act, the SBA questioned whether joint ventures should be eligible to participate in DOD's section 1207 program. By letter dated November 14, 1989, DOD advised the SBA that, "as a matter of policy, joint ventures are permissible under the section 1207 program." The SBA continued to express reservations as to whether Congress intended joint ventures to participate in SDB programs but, nonetheless, began developing regulations containing criteria for determining a joint venture's status as an SDB concern. Such regulations have not been issued and, to date, the SBA continues to decline to make SDB status determinations for DOD's section 1207 program.

The final determination regarding the SDB status of joint ventures under DOD's section 1207 program is "exclusively a matter for the SBA." O.K. Joint Venture, B-237328, Feb. 9, 1990, 90-1 CPD ¶ 170. Nonetheless, in instances where the SBA has declined to make this determination, DOD has no alternative but to determine, itself, the joint venture's SDB status. Id.; see also, Washington-Structural Venture, 68 Comp. Gen. 593 (1989), 89-2 CPD ¶ 130. Decisions in which we reviewed DOD's SDB determination of joint ventures' status for purposes of the section 1207 program have considered whether DOD's SDB decisions were reasonable. In light of the SBA's present declination to make the necessary determination, we will again consider whether the DOD's SDB determination was reasonable.

#### THE SDB DETERMINATION

SamCorp protests that CCI, the non-SDB member of the joint venture, provides the bonding for the project and, thus, controls the joint venture. SamCorp maintains that AEI would be financially and technically unable to perform the contract without CCI and, thus, the joint venture should not qualify as an SDB concern.

The solicitation defines 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 provides 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.

The Army contracting officer reviewed a copy of the AEI/CCI joint venture agreement as well as documents related to the technical and financial capabilities of the two companies to determine which firm will actually exercise control over the joint venture and manage the day-to-day operations of the construction project. He found that the joint venture agreement calls for both companies to provide the capital

needed to begin the project<sup>3/</sup> and requires CCI to provide project bonding. He also found that both profits and losses are to be divided between AEI and CCI at a rate of 51 and 49 percent, respectively. The agreement further provides that the project manager for the contract must be an employee of AEI, and that all books and records will be maintained in AEI's offices. The contracting officer also determined that AEI appears capable of performing at least 15 percent of the project with its own labor force as required by the solicitation and that the equipment necessary to perform the work will be available due to AEI's financial interest in an equipment leasing company. The contracting officer noted that AEI recently performed a smaller construction project for the Corps of Engineers and completed the work satisfactorily. Finally, the contracting officer determined that the joint venture had established a line of credit of \$330,000 which could be accessed with only an approved AEI signature.

The contracting officer concluded that notwithstanding the fact that CCI is providing bonding for the project, the presence of the other factors discussed above demonstrated that the joint venture is not controlled by CCI. Accordingly, the contracting officer concluded that the joint venture was qualified to receive the contract.

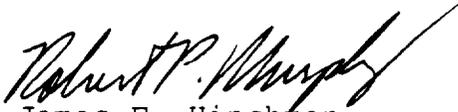
We find that the DOD contracting officer reasonably determined that the AEI/CCI joint venture was eligible to participate in the procurement. A majority of the profits will accrue to AEI as required by the solicitation and, further, AEI will be correspondingly liable for a majority of all losses. Cf. Washington-Structural Venture, supra. AEI will maintain all administrative records, perform at least 15 percent of the construction project with its own labor force, and facilitate the acquisition of equipment necessary to perform the work. Cf. O.K. Joint Venture, supra. Finally, there is a line of credit in excess of \$300,000 (approximately 10 percent of the joint venture's bid) available to the joint venture on the basis of only an AEI signature. Based on these factors, we conclude DOD reasonably determined that CCI's provision of

---

<sup>3/</sup> The percentage of capital to be provided by each party is not stated.

project bonding did not constitute control over the joint venture such that it should be disqualified from participating in the procurement.

The protest is denied.

  
for James F. Hinchman  
General Counsel