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

Decision

Matter of: Caltech Service Corporation

File: B-250784.2; B-250784.3

Date: February 4, 1993

Wayne A. Keup, Esq., Dyer, Ellis, Joseph & Mills, for the protester.
Paralee White, Esq., Jeanne A. Anderson, Esq., and Donn Milton, Esq., for PI/MCC Joint Venture, an interested party.
Tracy N. Gruis, Esq., and Lester Edelman, Esq., Army Corps of Engineers, Department of the Army, and David R. Kohler, Esq., and Audrey H. Liebross, Esq., Small Business Administration, for the agencies.
M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly determined that joint venture qualified as a small disadvantaged business (SDB) where procuring agency reasonably found that the SDB member has control over the joint venture; joint venture agreement indicates that the SDB member controls at least 51 percent of venture, contributes 51 percent of working capital, controls the venture bank accounts, makes day-to-day operational decisions, and provides all necessary labor and materials for performing the requirement.

DECISION

Caltech Service Corporation protests the award of the contract under request for proposals (RFP) No. DACA03-92-R-0017 to PI/MCC, a joint venture comprised of PI Construction Corporation, a small disadvantaged business (SDB), and MCC Corporation, a non-SDB. The RFP, as amended, was a 100-percent SDB set-aside for the repair, maintenance, and minor construction of real property at Fort Chaffee, Arkansas. Caltech contends that PI/MCC does not qualify as an SDB and thus was ineligible for the award.

We deny the protest.

The RFP contemplated award of a firm-fixed-price, indefinite delivery, indefinite quantity contract for a base and 4 option years. Award was to be made to the offeror whose offer conforming to the solicitation was most advantageous

to the government, cost or price and other factors considered. The solicitation listed the following major technical evaluation factors, along with the minimum requirements under each factor: (1) management, organizational structure and staffing; and (2) subcontracting support capability.

Nine offers were received by the closing date. After evaluation of initial offers, discussions, and evaluation of best and final offers (BAFO), PI/MCC's BAFO was the lowest technically acceptable offer, in the evaluated amount of $17,517,000, and Caltech's was second low at $19,102,500.

During the evaluation of BAFOs, the contracting officer was advised that PI had been determined not to qualify as an SDB under a previous solicitation. In light of this information, the contracting officer challenged PI's disadvantaged status with the Small Business Administration (SBA). Based on new information, SBA concluded that PI's status had changed, and determined by letter dated September 28, 1992, that PI qualified as an SDB for the procurement here. After review of the PI/MCC joint venture agreement, the Army determined that PI controlled the joint venture and awarded a contract to PI/MCC on September 30.

The protester contends that PI/MCC does not qualify as an SDB because MCC, the non-SDB joint venture, is responsible for the management and control of the venture.

Although the final determination regarding the SDB status of joint ventures under the Department of Defense's (DOD) Section 1207[1] SDB set-aside program is "exclusively a matter for the SBA," SamCorp Gen. Contractors, B-241740, Feb. 21, 1991, 91-1 CPD ¶ 198, the SBA has not yet issued regulations containing criteria for determining a joint venture's SDB status and currently declines to make such determinations under the DOD program. See 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., SamCorp Gen. Contractors, supra.

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[1]Section 1207 of the National Defense Authorization Act for Fiscal Year 1987, as amended, 10 U.S.C. § 2301 note, authorizes DOD's SDB set-aside contracts and SDB evaluation preferences. An SDB eligibility protest must be filed with the contracting officer, who then forwards the protest to the SBA for a conclusive determination. Defense Federal Acquisition Regulation Supplement (DFARS) § 219.302.

The solicitation defined an SDB as a small business that is at least 51 percent owned and controlled by one or more individuals who are socially and economically disadvantaged. The solicitation also 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.

In order to determine if PI/MCC qualified as an SDB, the Army reviewed a copy of the joint venture agreement. The agreement indicated that: (1) PI owns a 51 percent "working interest" in the joint venture; (2) capital contributions made by the firms and profits and losses would be divided based on that percentage interest; (3) PI will "conduct, direct, supervise, and control the project" and "have custody or control of all assets and perform all activities . . . to accomplish the project"; (4) PI will control the manner and method of performance of the joint venture project, with disputes between the ventures settled pursuant to "majority vote of the working interest holders"; (5) PI is to provide all of the labor and materials for the joint venture, with the authority to subcontract for portions of the work with other firms, including MCC, and purchase materials and supplies necessary for the work; (6) PI is to maintain the joint venture bank accounts for the payment of all expenses and the deposits of all receipts, keep the books and records, and pay applicable taxes for the joint venture; (7) PI is to indemnify the joint venture and MCC against claims; and (8) PI is to furnish its facilities, such as office supplies and local telephone service, without charge.

The agency determined that these factors demonstrated that the joint venture was owned and controlled by PI, not MCC as Caltech maintains. Since PI had been determined by the SBA to be an SDB, the agency concluded that the joint venture itself qualified as an SDB, and was thus qualified to receive the award. We find that the contracting officer's conclusion was reasonable. PI's ownership of the majority interest in the joint venture, entitlement to a majority of the profits, and authority to exercise day-to-day control over the project clearly are sufficient indices that the joint venture as an entity qualified as an SDB.

Caltech maintains other factors indicate control of the joint venture by MCC. For example, the protester contends that MCC has "negative control" of the joint venture since, pursuant to the joint venture agreement, the venture must approve all subcontracts and any regularly scheduled overtime. (As defined by 13 C.F.R. § 124.104(d)(1) (1992), negative control occurs when "the by-laws allow nondisadvantaged individuals to block any action proposed by the disadvantaged individuals.") We do not agree that MCC

has such control. As indicated, the joint venture agreement gives PI the right ultimately to resolve disputes by exercising its majority interest to control the vote of the management committee. This being the case, MCC could not block PI's approval of desired actions.

Caltech also argues that the agency should have considered the fact that MCC, not PI, was to provide the payment and performance bonds for the project, and that payments by the government to the joint venture shall be subject to a second lien or security interest held by MCC (with a first lien held by the joint venture). The protester believes these factors indicate control of the joint venture by MCC.

While MCC indeed appears to have significant financial involvement, this does not materially diminish PI's overall control of the venture. Bonding control or liability by the nondisadvantaged joint venturer by itself does not establish control of the venture, when other factors demonstrate control of the venture by the SDB joint venturer, SamCorp Gen. Contractors, supra. Here, even if MCC obtains the project bonding, the presence of the other factors discussed above reasonably demonstrated, we think, that the joint venture is not controlled by MCC. MCC's lien against joint venture revenues also does not change our view; the fact that MCC's financial stake in the joint venture is secured by a lien gives MCC no greater control than any secured creditor. Again, we do not think this renders unreasonable the agency's reliance on the significant other factors evidencing control by PI.

The protester argues that PI lacks control of the venture because the joint venture agreement failed to provide for compliance with the "Performance of Work by the Contractor" clause of the solicitation, which required the successful contractor to perform, with its own organization, at least 15 percent of the total amount of work to be performed under the contract. See Federal Acquisition Regulation (FAR) § 52.236-1. The agency responded in its report that, although the joint venture agreement did not specifically address the matter, it considered PI's majority interest in the venture sufficient to make PI responsible for meeting the 15 percent requirement. Caltech has not rebutted the agency's response, and we find nothing unreasonable in the agency's position. In any case, where an agency specifically addresses issues raised in the protest and the protester fails to rebut the agency's response in its comments, as here, we consider the issues to have been abandoned by the protester. RRRS Enters., Inc., B-241512; B-241512.2, Feb. 12, 1991, 91-1 CPD ¶ 152.

Finally, Caltech argues that the Army improperly failed to provide notification of its intent to award to PI/MCC, as

required by FAR § 15.1001(b)(2) to give unsuccessful offerors the opportunity to mount a timely challenge to the successful offeror's small business representation. See FAR §§ 15.1001(b)(2)(ii) and 19.302(d)(1). This was a procedural error that did not harm Caltech, since the SBA ultimately ruled that PI is an SDB, and we have found that the joint venture also qualified as an SDB.[2] This argument thus does not provide a basis for sustaining the protest. See Advanced Sys. Tech., Inc.; Engineering and Prof. Servs., Inc., B-241530; B-241530.2, Feb. 12, 1991, 91-1 CPD ¶ 153.

We deny the protest.

for James F. Hinchman
General Counsel

[2]We dismiss Caltech's further argument that contrary to DFARS § 219.301, PI did not qualify for award as an SDB on both the date of submission of its offer (both initial and BAFO) and the date of contract award. As discussed above, while PI's SDB status was at issue prior to award, the SBA nevertheless determined that PI qualified as an SDB 2 days before the agency made award to the joint venture. As the SBA has sole jurisdiction over the question of whether a concern qualified as an SDB, we will not review this determination. O.K. Joint Venture, supra.