



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Department of the Navy--Request for
an "Advisory Opinion"
File: B-228345.2
Date: April 7, 1988

DIGEST

There is no legal authority for the government to award a contract to an unincorporated association that has no legal existence independent of its membership and no authority to bind its membership for performance of the contract.

DECISION

The Military Sealift Command, Department of the Navy, has requested an "advisory opinion" regarding the propriety of awarding a contract for harbor and docking/undocking pilotage services in New York Harbor to two unincorporated associations. The two organizations, the United New Jersey Sandy Hook Pilots Benevolent Association and the United New York Sandy Hook Pilots Benevolent Association, have memberships which consist of self-employed individual harbor and river pilots who hold licenses issued by the States of New Jersey and New York, respectively, and/or the federal government. The associations submitted a joint offer in response to request for proposals No. N62381-87-R-0053, which was the lowest offer received by the Navy on the solicitation. The Navy asks whether the organizations have the requisite capacity to enter into a contract with the United States. We believe they do not.

According to the associations, they would enter into the contract on behalf of, and as agent for, the individual pilot members. The Navy states that the organizations have refused to form a joint venture; they have, however, offered to submit affidavits from the presidents of both associations declaring that they have the authority to enter into this contract and to obtain a power of attorney from each of their members. The associations have stated that they would guarantee that a pilot would be available to provide services whenever needed; however, each pilot would be individually responsible for his own contract performance. If one of the pilots performed unsatisfactorily, he would be taken off the list of eligible pilots, but no penalty would be assessed against the remaining pilots.

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The United New Jersey Sandy Hook Pilots Benevolent Association has approximately 40 members, and the United New York Sandy Hook Pilots Benevolent Association has approximately 60 members. The two organizations share office space, and operate a joint referral service which assigns pilots to specific jobs and then sends bills for the pilotage services rendered. These bills identify the pilot who performed the particular job, but designate another person as agent to receive payment.

It appears to us that there is no legal authority under which the organizations could be awarded this contract with their current proposal. Unlike corporations, these unincorporated associations have no existence independent of their membership. Mounteer v. Bayly, 448 N.Y.S.2d 583 (N.Y. App. Div. 1982). Under the proposal submitted by the associations, the government would be contracting with the associations as agents for the individual pilots, and therefore the contract would be performed by a group of contractors, with no party responsible for the totality of performance. The only pertinent authority for awarding a contract to a group of contractors is contained in Federal Acquisition Regulation (FAR) § 9.601 et seq., which defines a "contractor team arrangement" as one in which two or more companies form a partnership or joint venture to act as a potential prime contractor. (FAR § 9.701 et seq. also deals with contract awards to groups of contractors, but these sections are concerned solely with defense production contractor pools, and research and development contractor pools.)

In this case, the associations have specifically disclaimed any responsibility for the performances of the individual pilots. The associations have stated that they will only guarantee that a pilot would be available to provide the services.

Therefore, in order for the associations to be awarded the contract at issue, the pilot members must form a joint venture or partnership. Joint ventures are recognized legal entities for contracting with the government. T.V. Travel, Inc.; World Travel Advisors, Inc.; General Services Administration--Request for Reconsideration, 65 Comp. Gen. 109 (1985), 85-2 CPD ¶ 640. A joint venture is an association of persons or firms with an intent, by way of contract, to engage in and carry out a single business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge. Id.

In the absence of such an agreement among the pilots and their associations, the association offerors could not be found to be responsible prospective contractors, since they could not meet the minimum standards required of a

contracting party. FAR § 9.104-1. Thus, we do not believe that a contract can be awarded to the associations under this solicitation.

However, essentially the same purpose could be achieved by negotiating a variation of a basic agreement with the individual pilots through the associations acting as their agents. Such an agreement, while not itself a contract, could spell out all of the terms and conditions, including price, permit the associations to act as agents for those pilots who have given the associations the necessary powers of attorney to act on their behalf and provide for the award of individual contracts as required by the issuance of a purchase order or some other contractual document that incorporates the terms, conditions and price agreed to in the basic agreement. The agreement would have to name all of the pilots for whom the associations are authorized to act and the extent of the agent's authority.

Such an agreement could also be entered into with the other offerors with the understanding that individual contracts would be awarded on the basis of pilot availability and price.



Acting Comptroller General
of the United States