



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

McAuliffe 150331

2472110

Decision

Matter of: Affiliated Precision Services, Inc.

File: B-253757

Date: October 21, 1993

Denis L. Durkin, Esq., Baker & Hostetler, for the protester.
Walker Lee Evey, National Aeronautics and Space
Administration, for the agency.
Susan K. McAuliffe, Esq., and Andrew T. Pogany, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Agency reasonably determined that protester did not qualify as a women-owned small business where agency had reasonable doubt that women actually had control of the firm in light of the firm's affiliation with entities that are not women-owned companies.

DECISION

Affiliated Precision Services, Inc. protests the rejection of its bid under invitation for bids (IFB) No. 10-93-0038, issued by the National Aeronautics and Space Administration (NASA) for the modernization of the industrial area heating, air conditioning and humidity control system at NASA/Kennedy Space Center, Florida. The IFB was issued on February 4, 1993, as a 100 percent small disadvantaged business (SDB) set-aside. Affiliated contends that it was improperly rejected as a non-SDB and that the firm should have been awarded the contract as the low bidder.

We deny the protest.

The solicitation, referencing NASA Federal Acquisition Regulation Supplement § 18-52.219-76, defined the term "small disadvantaged business concern" to mean:

"a small business concern owned or controlled by individuals who are both socially and economically disadvantaged (within the meaning of [§] 8(a)(5) and (6) of the Small Business Act (15 U.S.C. [§] 637(a)(5) and (6) [(1988)]). For purposes of this

clause, socially and economically disadvantaged individuals shall be deemed to include women."¹

The IFB incorporated Federal Acquisition Regulation (FAR) § 52.219-13, which refers to women-owned small businesses as "small business concerns that are at least 51 percent owned by women who are United States citizens and who also control and operate the business." This FAR provision defines "control" to mean exercising the power to make policy decisions; "operate" to mean being actively involved in the day-to-day management of the business; and "small business concern" to mean a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on government contracts, and qualified as a small business under the criteria and size standards set forth in the Small Business Administration (SBA) regulations at 13 C.F.R. part 121 (1993). The solicitation did not set forth any specific evaluation criteria or review process to be followed by the agency in determining whether a firm was a women-owned business; all parties also agree that neither agency regulations nor SBA regulations provide specific factors governing a determination of women-owned status.²

The protester submitted the apparent low bid of the seven bids received by the March 8 bid opening. Shortly after bid opening, the apparent second low bidder filed a size status protest against Affiliated with the contracting officer; the protest also challenged Affiliated's SDB status on the grounds that the firm is controlled by its affiliates which are owned or controlled by nondisadvantaged individuals.

¹The agency explains that this procurement was set aside for SDB concerns to meet NASA's statutory goal, as set out in the Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act of 1993, Pub. L. No. 102-389, 106 Stat. 1571, 1610 (1992), that 8 percent of the total value of NASA's prime contracts and subcontracts be awarded to SDB firms, defined as including women-owned firms. NASA further explains that the set-aside was conducted pursuant to a determination made under 10 U.S.C. § 2304(c)(7) (1988) that it is in the public interest to use other than competitive procedures for this procurement.

²To the extent the protester contends that the solicitation was flawed for not providing more information regarding the agency's evaluation of women-owned business status or concerning a firm's qualification as a women-owned business, the challenge is untimely filed since any protest of alleged solicitation improprieties must be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1993).

The protest was referred to the SBA. By letter of April 27, the SBA concluded that, in accordance with the standards set forth in FAR part 19 and 13 C.F.R. part 121, the firm qualified as a small business since the firm's and its affiliates' combined average annual receipts were within the \$17 million size standard for the procurement. The SBA, however, declined to review the issue of Affiliated's SDB status as a women-owned business. The SBA found that the contracting agency's inclusion of women-owned businesses in the definition of SDB concerns was unique to that agency and not within the terms of current SBA regulations; the SBA determined that the issue of women-owned disadvantaged status in this instance was to be resolved by NASA.³

Based upon his review of information submitted by Affiliated, including its corporate charter, organization data and a list of its stockholders and those of its affiliates, the contracting officer determined that the protester was not a women-owned business. The contracting officer found that although 55 and 1/2 percent of the protester's stock was owned by women, it was doubtful that women actually maintained majority control over the firm due to its affiliation with non-SDB firms having the power to control Affiliated. The contracting officer found significant common interest between Affiliated and its non-SDB affiliates based upon stock ownership; spousal relationships; common management, facilities, personnel, and other resources; and the fact that at the time of the agency's review of Affiliated's assets, the vast majority of the firm's financial resources, working capital, and ability to acquire necessary bonding were obtained through loans from the protester's non-SDB affiliates.

The agency's investigation revealed that Affiliated is a start-up company affiliated with Precision Resources, Inc. (PRI), Precision Mechanical, Inc. (PMI), Precision Fabricating & Cleaning, Co., Inc. (PFC), and Precision Enterprises, Inc. (PEI). PRI was found to wholly own PMI, PFC and PEI; PRI owns 41 percent of Affiliated's stock. Affiliated's president is the president of PMI--he is currently paid by PMI for his services to that firm--and he is also an assistant vice president of PRI. The information obtained also showed that all of the companies are located in the same building and that the vast majority of Affiliated's assets were loan funds from PMI (the protester now reports that these funds have been paid back), with the

³Although we do not ordinarily review SDB-eligibility issues, we do so here in light of the SBA's refusal to evaluate the women-owned status of the firm. See Washington-Structural Venture, 68 Comp. Gen. 593 (1989), 89-2 CPD ¶ 130.

bulk of the balance provided by PRI's president and majority stockholder. The contracting officer further noted that almost all of Affiliated's stockholders (including several of its corporate officers and directors) are married to PRI's stockholders or corporate officers and directors; in addition to the close family relationships between all of the firms, the contracting officer was concerned about joint obligations among the parties--the indemnification clause in the protester's bid bond obligates all spouses with respect to assets. NASA also noted Affiliated's intent to use labor and other resources from its affiliates.

PRI, which controls the majority of the assets of the protester and each of its affiliates, is 59 percent owned by men. The agency determined that Affiliated's corporate records showed that 55 and 1/2 percent of the newly created organization's stock is owned by women, but that Affiliated's net worth (and the value of the women-owned stock) is insignificant compared to the net worth of PRI, a large minority (i.e., 41 percent) shareholder of Affiliated. Based upon the strength and multitude of the familial, financial, and corporate interests of its non-SDB affiliates, indicating a power to control the start-up company's operations, the contracting officer doubted whether Affiliated exercised independent control of its operations or had independent policy-making responsibilities. The agency further concluded that since the protester had relied upon its close affiliation with these other companies to affirmatively establish the newly created company's responsibility during its preaward survey, the firm should not now be allowed to characterize those affiliations as being other than significant. The agency consequently rejected the firm's bid. This protest followed.

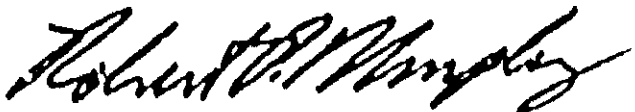
The protester contends that the contracting officer acted improperly by evaluating the firm's women-owned status under the affiliation rules set forth in FAR part 19 in connection with small business size status. Affiliated contends that in light of the lack of regulations directly governing women-owned business status determinations and the IFB's failure to set forth the exact method of evaluation to be followed, it would have been more appropriate for the contracting officer to base his determination on the stock ownership criteria of the SBA regulations at 13 C.F.R. part 124 governing the section 8(a) program. Affiliated argues that had he done so, he would have found that the protester

was a women-owned business on the basis that more than 50 percent of Affiliated's stock is owned by women. The protester does not contest the contracting officer's factual findings regarding its relationship to the affiliates.

We do not agree with the protester that NASA was required to consider only stock ownership of the firm in determining whether the protester qualified as a women-owned business entitled to SDB status. As stated above, the IFB included a FAR clause that defined a women-owned business as one that not only is at least 51 percent owned by women but also is controlled and operated by women. Moreover, the SDB qualification requirements of 13 C.F.R. part 124, upon which the protester relies, are not limited to stock ownership considerations. Part 124 also imposes control and management requirements for section 8(a) certification, 13 C.F.R. § 124.104, and refers to the small business size requirements of 13 C.F.R. part 121, which require affiliation and control to be taken into account in determining size status. The provisions of FAR part 19 are consistent with and reflect the provisions of 13 C.F.R. part 121.

We think NASA reasonably considered affiliation and control matters as well as stock ownership to determine whether the protester was eligible for award. Given the magnitude of Affiliate's affiliations with non-SDB concerns--including the multitude of interspousal relationships among stockholders and corporate directors and officers, the financial immaturity of the firm and shared liabilities among the parties for the firm's obligations, the common management, facilities and the newly organized nature of the concern--we have no basis to question the reasonableness of the agency's rejection of the protester's bid. See O.K. Joint Venture, 69 Comp. Gen. 245 (1990), 90-1 CPD ¶ 170.

The protest is denied.


for James F. Hinchman
General Counsel