Protest of	)	
	)	Date: February 22,1991
J.T. CONSTRUCTION CO., INC.	)	
	)	
Solicitation No. 489986-90-A-0133	)	P.S. Protest No. 90-59

DECISION

J.T. Construction Co., Inc. (JT Construction), timely protests award of a construction contract to Guerra-Williams, Inc. (Guerra-Williams), contesting its eligibility as a small business concern and as a minority business enterprise.

On June 15, 1990, the Dallas Facilities Service Office (FSO) issued Solicitation No. 489986-90-A-0133 for construction of the Brazoria, TX, Main Post Office. The project was identified as suitable for competition among minority-owned businesses in accordance with Procurement Manual (PM) 10.1.4 and as such, offers were solicited only from minority-owned businesses.[1/] Offers were to be evaluated on the basis of price.

Four offers were received, including those of JT Construction and Guerra-Williams. The Postal Service entered into discussions with the offerors. Following an initial request for "best and final" offers, an error was discovered in the specifications for the project; the solicitation was amended, and further best and final offers were requested by September 14.

Before final offers were due, JT Construction orally advised the contracting officer of its intent to protest the minority status of Guerra-Williams, should Guerra-Williams be the successful offeror. The contracting officer responded by requesting additional

[1/]PM 10.1.1 b.4. defines a minority-owned business as

> [a] concern that is at least 51 percent owned by, and whose management and daily business operations are controlled by, one or more members of a socially and economically disadvantaged minority group, namely U.S. citizens who are Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans. (Native Americans are American Indians, Eskimos, Aleuts, and Native Hawaiians. Asian-Pacific Americans are U.S. citizens whose origins are Japanese, Chinese, Filipino, Vietnamese, Korean, Samoan, Laotian, Kampuchean, Taiwanese or in the U.S. Trust Territories of the Pacific Islands. Asian-Indian Americans are U.S. citizens whose origins are in the Indian subcontinent.)

information from Guerra-Williams about its minority status. The contracting officer received the requested information.[1/]

After review of the best and final offers, the contract was awarded to Guerra-Williams on September 20. JT Construction's protest to this office was received October 2. The protester contends that Guerra-Williams is neither a small business[1/] nor a minority business enterprise. JT Construction further contends that Guerra-Williams is an "affiliate"[1/] of Williams Industries, a non-minority company.[1/]

JT Construction alleges, among other things, that Gary D. Williams owns a large percentage of stock in Guerra-Williams as well as 100% of the stock in Williams Industries. It requests that the Postal Service conduct further investigation about Guerra-Williams.

The contracting officer's report on the protest relies on the information previously supplied by Guerra-Williams (supra, fn 2) to support the firm's minority business status.

In a supplemental response to the contracting officer's comments, JT Construction argues that Guerra-Williams has "not supplied any relevant proof that they are a true minority enterprise controlled by Mr. Guerra." JT Construction also reiterates its belief that Guerra-Williams is a "front" for Williams Industries, and that awarding the contract to Guerra-Williams violates the spirit and the intent of the Postal Service's

[2/]The information supplied identifies Guerra-Williams as a Texas corporation chartered in 1987. Arthur H. Guerra, holder of 51% of the corporation's stock, is identified as the corporation president who "manage[s] and control[s]" the business. The remaining 49% of the corporation stock is said to be owned by Mrs. Gwen Williams, who a March, 1988, Consent of Shareholders in Lieu of Annual Meeting identifies as the corporate vice-president, secretary, and treasurer. Mr. Guerra and Mrs. Williams are the company's current directors, Mrs. Williams having replaced Gary Williams, one of the two initial directors (Mr. Guerra having been the other). Also included was a March 6, 1990, certificate of the San Antonio Minority Supplier Development Council acknowledging and recognizing Guerra-Williams as a "minority/woman-owned, controlled and operated business enterprise" according to the Council's certification standards.

[3/]The protester notes some confusion whether Guerra-Williams' status as a small business is relevant to its eligibility for award. As we understand the regulations, it is not. Accordingly, we do not consider further Guerra-Williams' small business status.

[4/]In this regard, JT Construction cites the definition of "affiliate" set out at 13 CFR ' 121.401. That is the Small Business Administration's definition of the term for the purpose of determining whether a business is a "small business" or not. The Postal Service has a similar definition for a similar purpose, see PM 10.1.1 b.1. and 2. However, as noted above, small business status is not relevant in this case.

[5/]A Dun and Bradstreet report on Williams Industries, Inc., describes it as a corporation founded in 1979, of which the sole stockholder is Gary D. Williams, its president. Williams Industries' vice-president is Arthur Guerra, and its secretary is Gwen K. Williams.

socioeconomic policies.

Guerra-Williams was notified of this protest, and submitted comments rebutting JT Construction's allegations. The response notes that, contrary to those allegations, Gary D. Williams is not a stockholder in Guerra-Williams, nor does he have corporate management responsibility for it.[1/] The response further notes that Guerra-Williams is not a newly formed corporation, having been established in 1987, and that it leases space and facilities from Williams Industries, Inc., pursuant to a 1987 agreement.

Discussion

It is well settled that a contracting officer's affirmative determination regarding the responsibility of a prospective contractor will not be overturned unless the protest falls within the very narrow standard of review employed by this office: in the absence of allegations of fraud or bad faith on the part of the contracting officer, or of claims that definitive responsibility criteria set forth in the solicitation were not applied, we will not review a protest against an affirmative determination of responsibility. See Sensory Electronics, Inc., P.S. Protest No. 87-124, January 21, 1988; Lightron of Cornwall, Inc., P.S. Protest No. 84-6, February 27, 1984; EDI Corporation, P.S. Protest No. 83-51, January 26, 1984. If a protester alleges misapplication of definitive responsibility criteria, our review is limited to determining whether the contracting officer had before him information from which he reasonably could have determined that the criteria were or were not met. TLT Construction Corp., Inc., P.S. Protest No. 89-75, January 18, 1990; Power Systems, Comp. Gen. Dec. B-210032, August 23, 1983, 83-2 CPD & 232.

In the instant case, the contracting officer made an affirmative determination that the awardee was responsible and met the definitive responsibility criteria pertaining to minority business status based upon its submissions and the requirements of the solicitation. The protester challenges this determination and alleges fraud and bad faith as well as a violation of postal socioeconomic policies.

In deciding whether Guerra-Williams is a minority-owned business, we look to whether 51 percent of the corporation is owned, managed, and operated day-to-day by one or more members of a socially and economically disadvantaged minority group. See PM 10.1.1 b.4. Here, the information in the record reveals inter alia, that Guerra-Williams is a Texas corporation chartered in 1987, and that Arthur H. Guerra is a holder of 51% of the corporation stock and is identified as the corporation president who "manage[s] and control[s]" the business. Although, an issue is presented whether Gary D. Williams

[6/] This last information, while consistent with the information furnished in response to the contracting officer's request, is inconsistent with material contained in Guerra-Williams' offer. That offer indicated, in response to paragraph L.3, which requested the names, titles, and telephone numbers of the persons authorized to negotiate on the offeror's behalf, that one such authorized negotiator was "Gary D. Williams, Vice-Presider [sic]."

participates in the day-to-day decision-making or operations of Guerra-Williams, there is insufficient evidence to establish that is in fact the case; nor is there any evidence in the record that Arthur H. Guerra does not own 51% of the corporation or is not making the day-to-day business decisions for the corporation.

As stated above, JT Construction also contends that Guerra-Williams, Inc., is an "affiliate" of Williams Industries. Although we are concerned with the possible affiliation of the two companies, we find it immaterial with regard to whether Guerra-Williams is a minority owned company as the issue of affiliation is relevant only to Guerra-Williams' small business status, which is not at issue in this case.

As to JT Construction's allegation of bad faith, the record reflects that the contracting officer acted in good faith when he reviewed the additional documents submitted by Guerra-Williams against the requirements of the solicitation and applicable Postal Service regulations.

Additionally, Postal Service regulations (i.e., PM 10.1.1 b. 4., and Section L, Representations and Certification, of the Solicitation), only require an offeror to self-certify that it is a small business concern and/or a minority business enterprise.[1/] Here, Guerra-Williams certified that it was indeed minority-owned, and submitted additionally requested documentation to that effect.[1/]

Based on our review of the records, including the solicitation and the documents submitted by the offerors, we find that the contracting officer's affirmative determination that Guerra-Williams was a responsible minority-owned enterprise was made in good faith and that he had before him information from which he reasonably could have

[7/]In its supplemental comments, the protester cites 13 CFR 124 (regulation of the Small Business Administration (SBA) governing the designation of disadvantaged groups) and submits a recent Comptroller General procurement decision (Washington Structural Venture, Comp. Gen. Dec. B-235270, 89-2 CPD & 130, August 11, 1989) in support of its allegation that Guerra-Williams is being financially controlled by Williams Industries and should not be considered a small/minority-owned business.

Determinations of the SBA are not binding upon the Postal Service as the Postal Service has been specifically excluded from the definition of the term "Federal Agency" in the statutory provisions from which the SBA derives its authority. (See 15 U.S.C.
" 632(b) and 637c(2) and 39 U.S.C. ' 410(a) (generally exempts the Postal Service from complying with Federal procurement statutes)). The Postal Service has its own regulations which relate to and define minority enterprise. See PM 10.1. As for the Comptroller General decision cited by the protester, we find it unpersuasive. Based on the facts before it, the Comptroller General's office determined that the small disadvantaged business did not control 51% or more of the joint venture bidder and that the joint venture was therefore ineligible for the set aside contract. This factual determination has no bearing on the contracting officer's determination in this case, on different facts, that Guerra-Williams was 51% controlled by Mr. Guerra.

[8/]It should be noted that submitting false information is considered a criminal offense under Federal Law, and the submitter of such information may be subject to criminal prosecution. Specifically, 18 U.S.C. ' 1001 prescribes the penalty for making false statements in offers.

determined that the minority business criterion was met. We therefore uphold the contracting officer's determination. See, TLT Construction Corp., Inc., P.S. Protest No. 89-75, supra; Sensory Electronics, Inc., P.S. Protest No. 87-124, supra; Amigo Construction Co., Inc., P.S. Protest No. 83-19, August 12, 1983.

Finally, JT Construction has not provided any evidence to support its allegations that postal socioeconomic policies were violated. The policies set out in Section 10.1 of the PM are meant to encourage the participation of small and minority-owned businesses; in this instance, the contracting officer's acceptance of Guerra-Williams' offer was in keeping with those policies and regulations. See Mr. Cool's Refrigeration and Air Conditioning, P.S. Protest No. 84-53, October 10, 1984; Executone TeleCom, Inc., P.S. Protest No. 83-52, October 24, 1983.

The protest is denied.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[checked against original JLS 6/22/93]