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facsimile transmittal

Date: October 5, 2007

Re: GAO Protest of **FitNet Purchasing (B-309911)**

From: Tracy Williams, Paralegal Specialist

NUMBER OF PAGES (INCLUDING THIS COVER SHEET): 11 pages

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MESSAGE

Accompanying this header sheet is the Army's comments in response to the GAO's facsimile dated September 27, 2007 for the above mentioned protest. If transmission problems occur, please contact Ms. Tracy Williams, 703-696-2850, DSN: 426-2850. All other matters please contact Captain Charles Halverson, Trial Attorney at 703-696-2846 or DSN 426-2846.

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REPLY TO
ATTENTION OF

October 5, 2007

Contract and Fiscal Law Division

Paul Wengert, Esq.
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U.S. Government Accountability Office
441 G. Street, NW
Washington, D.C. 20548

Subject: GAO Protest of FitNet Purchasing Alliance, B-309911

Dear Mr. Wengert:

The Army hereby provides comments in response to the GAO's facsimile, dated September 27, 2007. We first address the issue of Protester's standing as an interested party, and we next offer our views on the notion that FAR 8.404a conflicts with the Small Business Act.

1. FitNet Is Not An Interested Party.

Only an interested party may protest a federal procurement to the Comptroller General. 31 U.S.C. § 3553(a). An interested party is "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." *Id.* at § 3551(2)(a). "Determining whether a party is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement." *Four Winds Servs., Inc.*, B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57 at 2.

Where a protester challenges an FSS procurement but is not itself an FSS vendor, and thus would not be in line for receipt of an order should it prevail on its protest, it does not have an economic interest sufficient to make it an interested party. *See Sales Res. Consultants, Inc.*,

B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102 at 11; *Lockmasters Sec. Inst.*, B-299456, May 21, 2007, 2007 CPD ¶ 105 at 13.

Here, the solicitation for the delivery of fifty (50) wardrobe lockers noted that the contract would be a purchase order or delivery order from a GSA schedule. In addition, it stated bidders must have the items on an existing GSA schedule; that is, bidding was only open to GSA schedule holders. (AR, Tab 3) Protester is not a schedule holder. Applying the rule stated in CICA and the interpreting GAO case law, Protester is not an interested party and therefore, cannot challenge the procurement.

As the GAO states in its September 27 facsimile, "Under CICA, FSS contracts are placed on equal footing with bids and proposals as a competitive procedure. 41 U.S.C. § 259(b)(3),...." We agree, of course, and since the agency here elected to meets its requirement by purchasing from vendors holding FSS contracts, it necessarily follows only holders of FSS contracts have the requisite standing to challenge the procurement at issue. FitNet may argue that the decision to set aside the instant requirement for FSS contracts was prejudicial *per se*, but the GAO has recognized such an assertion fails to state a valid basis for protest. As the GAO stated in *FitNet Purchasing Alliance*, B-309911, Sept. 27, 2007, 2007 CPD ¶ _, "limiting the pool of competition to vendors holding FSS contracts is legally permissible, even if an individual protester may be unable to compete because it does not hold an FSS contract."

Because Protester is not an FFS contract holder, it is not an interested party and this protest should be dismissed.

2. FAR 8.402a Does Not Conflict With the Small Business Act.

In its submission of September 14, 2007 (hereinafter "GSA comments"), the GSA explained convincingly why FAR Subpart 8.4 construes harmoniously any potential statutory conflicts. As the GSA notes, neither 15 U.S.C. § 644, 40 U.S.C. § 501, nor 41 U.S.C. § 259(b) provide guidance regarding the implementation of small business programs within the FSS program. Of course, if Congress had wished to provide that sort of detailed statutory guidance, it could have. It did not, of course, and as the GSA explains, any review of the rules promulgated to give effect to congressional intent in such situations must be guided by the analysis set forth in *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). If a statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based upon a permissible construction of the statute." Moreover, the Federal Circuit has specifically held that FAR regulations are entitled to the *Chevron* level of deference. *Brownlee v. DynCorp*, 349 F.3d 1343, 1354 (Fed. Cir. 2003).

The FAR Council and the OFPP have crafted regulations regarding FSS orders that synthesize the congressional intent under FASA to streamline Government procurements with the needs of small businesses as codified in the Small Business Act. A balance has been struck, as explained by the GSA, to apply FAR Part 19 considerations at the time FSS contract are awarded, and to consider small business contracting objectives when orders are placed under FSS contracts. The regulatory scheme is certainly a "permissible construction" within the meaning of *Chevron*. Thus the FAR provision at issue here is the end product of a policy decision to balance competing interests pertaining to FSS task order.

The GSA comments in this case provide an excellent summation of the inner workings of the FAR Council, organized under the auspices of the OFPP. (GSA comments at p. 6, citing 41 U.S.C. §§ 404(a), 405, 421.) The point made by GSA is that the FAR Council operates pursuant to a mandate from Congress to promulgate regulations to implement procurement statutes. OFPP is specifically charged with resolving competing interests among federal agencies in this regard, and in the area of the FAR regulation pertaining to the functioning of the FSS program, it has done so. Commencing in 1989, and updated in 1995, 1999, and 2002, FAR 8.404 has provided regulatory guidance to agencies about how to place orders under FSS contracts. Every version of FAR 8.404 ever promulgated exempts orders placed under FSS contracts from the requirements of FAR part 19. (GSA comments, pp. 6 – 7)

This long, consistent history is significant. It reflects the considered judgment of the OFPP and the FAR Council that the need to provide an efficient way to provide goods and services to federal agencies has been appropriately balanced against the needs of small businesses. That balance has been struck so that agencies need not comply with the requirements of FAR Part 19 at the point when an order is placed under an FSS contract.

The role of the GAO in discharging its bid protest function is to determine whether a solicitation, proposed award, or award, comply with statute or regulation. 31 U.S.C § 3554(b)(1). Here, the SBA invites the GAO to go further and actually involve itself in reviewing the legality of FAR regulations. We would hope instead that the GAO would accord great deference to FAR 8.404a, which as we have explained above, is entitled to great deference.

We believe that the GAO has done precisely that in its previous published opinions. *Global Analytic Info. Tech. Servs., Inc.*, B-297200.3, Mar. 21, 2006, 2006 CPD

¶ 53, involved an acquisition reserved for FSS contract holders that had initially been a small business set-aside. The agency then amended the RFQ to provide for full and open competition, and a small business challenged that decision. The GAO held:

> The protest is without merit. As noted above, the agency conducted this procurement as an FSS acquisition under FAR part 8.4. FAR § 8.404(a) specifically provides that FAR part 19 (Small Business Programs) does "not apply" (except under circumstances not relevant here) to orders placed against FSS contracts. Thus, the agency was not required to set the requirement aside in the first instance, and was not precluded from subsequently re-soliciting the requirement on an unrestricted basis. In this latter regard, we have specifically held that the FAR exempts task orders issued under FSS contracts from application of the set-aside withdrawal requirements found in FAR § 19.506. Millennium Data Sys., Inc., B-292357.2, Mar. 12, 2004, 2004 CPD P 48 at 9-10. The protester's belief that equity and fairness dictate that the set-aside restriction be maintained under the reissued RFQ does not provide a basis for us to conclude that the agency was required to do so. n1

In its September 27 facsimile the GAO notes that this decision did not involve a direct challenge to whether FAR 8.404a was in conflict with the Small Business Act. We believe that the key point of this decision is its broad, unambiguous recognition of the validity of FAR 8.404a, and it is but one of a line of GAO decisions that have accorded the appropriate deference to that regulatory provision. *See, e.g., Millennium Data Systems, Inc.*, B-292357.2, Mar. 12, 2004, 2004 U.S. Comp. Gen. LEXIS 55 at 20 "[protester] cannot rely upon non-regulatory provisions in an internal GSA document to override the FAR's express exemption of task orders from the requirements of FAR part 19." We see nothing in the arguments presented by the SBA or Protester that should dissuade the GAO from according continued deference to FAR 8.404a.

We note that the SBA suggests that the GAO holdings in *Information Ventures, Inc.*, B-291952, May 14, 2003, 2003 CPD ¶ 10 and *Future Solutions, Inc.*, B-293194, Feb. 11, 2004, 2004 CPD ¶ 39 were predicated on the fact that those decisions pertained to acquisitions exceeding $100,000. If that were the case, of course, one might reasonable expect to see that

distinction noted in both decisions. Yet a review of them fails to reveal any discussion of the distinctions urged by SBA. Both these decisions accord fully with the *Global Analytic* holding that FAR part 19 does not pertain to FSS orders placed under FAR part 8.4.

The SBA makes the astonishing assertion that "small business set asides are mandatory for acquisitions valued from $3,000 to $100,000 and take priority over GSA Schedule contracts." (SBA comments, p. 5) For this proposition it cites to 15 U.S.C § 631(a) and 15 U.S.C. § 644(a) which say nothing about the priority between small business set-asides and FSS contracts. In a footnote, the SBA suggests that the phrase "notwithstanding any other provisions of law" in § 31 of the Small Business Act established the primacy of the Small Business Act over the law relating to GSA Schedule contracts. What the SBA fails to explain is how these trump the clear direction from Congress in other statutory provisions that empower the GSA Administrator to establish efficient methods for federal agencies to acquire goods and services. 40 U.S.C. § 501(a), 41 U.S.C. § 259(b)(3). Also, all of these SBA arguments could have been – and probably were – made by the SBA to OFPP and the FAR Council.

The authority of the FAR Council and OFPP in this area was aptly put in the GSA comments as follows:

> The FAR Council is the governing body responsible for maintaining the FAR and is comprised of the Office of Federal Procurement Policy (OFPP), the Department of Defense (DoD), the National Aeronautics and Space Administration (NASA), and GSA....GSA, DoD and NASA are jointly tasked with the preparation, issuance and maintenance of the FAR. (41 U.S.C. §§ 405 and 421; FAR § 1.103)....[I]n carrying out its duties, OFPP is specifically directed to consult with the Small Business Administration. 41 U.S.C. § 405(e)(1). The FAR Council frequently balances the needs of various programs during the rulemaking process. Since *the FAR rulemaking process has already provided for review of the applicability of FAR Part 19 small business programs to the FSS ordering*

process, SBA concerns regarding FAR Subpart 8.4 provisions have already been considered and resolved.

> Maintenance of the FAR is accomplished through the...action of...the Civilian Agency Acquisition Council (CAAC), which GSA chairs, and the Defense Acquisition Regulations Council (DARC)...The OFPP mandates regarding dispute resolution and consultation with SBA are routinely carried out in committee meetings conducted by GSA, and DoD. For example, *the CAAC is required to include a representative from SBA.* (FAR § 1.201-1(b)(2)). When a request is received to add to or amend the FAR, a FAR case is opened and reviewed by...the CAAC and the DARC in accordance with the procedures set for in 1.201-1. (emphasis added)

(GSA comments, p. 6). The consistent history of FAR 8.404a being promulgated in a form that the SBA finds objectionable, coupled with the fact that the SBA has a representative on the CAAC, suggest that the arguments the SBA has urged here upon the GAO have been made to the CAAC and DARC, and hence to OFPP, and have been consistently rejected. In fact, when the CAAC and DARC agreed on the final rule of FAR § 8.404, they specifically considered the issue that the GAO has raised here – whether agencies are required to set aside for small businesses FSS procurements that fall within the $3,000-$100,000 range.

> [We] do not concur with the suggestion that all orders under $100,000 be set-aside for small business. The Councils concluded that [suggestions submitted by those who responded to the Councils' request for comments] would fundamentally alter the schedules program in terms of the efficiency and effectiveness of the overall program by increasing the administrative burden on agencies without having demonstrated that the changes would, in fact, benefit small business over the long term. In addition, the basic statutory authority for the program provides that contracts and orders be open to all sources. Creating a set-aside for all such orders would be inconsistent with the program's basic operating authorities.

69 Fed. Reg. 34,231 (June 18, 2004).

The SBA clearly is dissatisfied with this determination, and sees protests like the instant one as convenient fora for continuing the fight. Yet its arguments lack persuasion because they

fail to recognize the primacy of the FAR Council in reconciling the competing interest involved in this issue, and they fail to address important provisions of the FAR that do in fact advance the interest of small business in the area of FSS task orders. In this regard, the GSA comments make two important points that were not touched upon by the SBA comments. The first is that the GSA does apply FAR part 19 at the point where FSS contracts are planned and awarded. (GSA comments page 2) This requirement is found in FAR 38.101(e). Nothing in the authorities cited by SBA suggests that the provisions in FAR part 19 were ever intended to be made applicable in repetitive fashion, i.e., once when a contract is competed and later when orders are placed under that same contract.

The GSA approach of considering FAR part 19 provisions at the inception of an FSS contract is consistent with FAR part 38 and seems a reasonable approach to balancing the competing statutory provisions at play here. As the GSA comments explain, approximately 80% of the contracts awarded under the GSA schedule program have gone to small businesses. Indeed, ten of the twelve FSS vendors that provide the wardrobe lockers sought in the instant solicitation are small businesses. (GSA comments, p. 4). All of this information is important to understanding how the implementation of FAR part 8.4 and FAR part 38 give effect to the objectives of the Small Business Act.

The GSA also explains that in addition to FAR 38.101(e), other provisions ensure meaningful opportunities for small business competition for FSS orders. FAR 8.404-5 encourages agencies to consider small business opportunities when placing orders, and FAR 7.204(d) and 7.107 limit bundling when placing FSS orders. (GSA comments, p. 3) It is significant that the SBA comments submitted to the GAO in this protest do not touch upon the

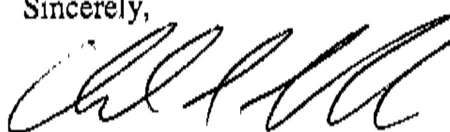
provisions of FAR 38.101(e), and do not explain why that provision is insufficient to meet the intent of the Small Business Act.

In this regard, the legislative history quoted by the SBA on pp. 8 – 9 of its comments actually supports the GSA's position. The legislative history shows that Congress recognized the tension between FASA and the Small Business Act, and intended to rely on the sound judgment of executive branch agencies to promulgate regulations that adequately balanced these competing interests. Provisions like FAR 8.404a, and its parallel provision, FAR 19.502-1(b), plus all the FAR provisions cited above, do precisely that.

3. Conclusion.

The SBA evidently is dissatisfied with the balance that has been struck by the FAR Council and OFPP in reconciling the competing requirements of the Small Business Act and FASA. The SBA evidently wishes to adjust that balance to a point better suited to its agency objectives. With that goal in mind, the SBA invites the GAO to inject itself as a referee in what is clearly a policy debate among executive branch departments. The GAO should decline this invitation, and should instead accord FAR 8.404a the deference it deserves.

Sincerely,



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