

THE BUREAU OF NATIONAL AFFAIRS

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GAO Finds No Standing to Protest Failure To Set Aside Competition Under FSS Buy

Small business FitNet Purchasing Alliance is not an “interested party” to challenge the Army's decision not to set aside for small businesses a \$12,000 order under the Federal Supply Schedule program, because FitNet does not hold an FSS contract, the Government Accountability Office decided Nov. 2 (*FitNet Purchasing Alliance*, GAO, B-309911, 11/2/07).

This means that the fundamental issue posed by the closely watched protest-- whether General Services Administration multiple award schedule programs are exempt from the set-aside requirements of the Small Business Act, which generally apply to acquisitions valued at between \$3,000 and \$100,000--is still to be resolved. This issue has been described by one large business representative as “huge.”

GAO explained that during the course of the protest, it sought the views of GSA, the Small Business Administration, and the Army as to this issue, and that “these agencies do not agree” about how the set-aside requirements of the act apply to orders placed against the FSS.

“In our view, however, regardless of how these requirements apply to the FSS, a protester that does not hold an FSS contract is not an interested party to challenge a decision not to set aside an individual order,” GAO wrote.

FAR Exemption Challenged.

In its protest, FitNet challenged the implementation of the Small Business Act set-aside requirements in the Federal Acquisition Regulation, arguing that the act “clearly articulates” that all procurements be subject to its set-aside provisions and establishes no exemptions.

FAR 19.502-2(a) generally requires that acquisitions valued between \$3,000 and \$100,000 be set aside exclusively for small business unless the contracting officer determines that there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery.

However, FAR 19.502-2(b) provides that this “rule of two” set-aside mandate does not apply to purchases from required sources of supply under FAR Part 8, including FSS contracts. In fact, many large businesses have considered this a major advantage of holding an FSS contract, in that they can sell under FSS contract task orders supplies

and services valued at between \$3,000 and \$100,000 that otherwise would have been reserved for small businesses.

SBA, GSA Hold Different Views.

According to copies of protest documents provided by FitNet on its Web site, the Small Business Administration Sept. 4 submitted to GAO a recommendation that FitNet's protest be sustained. "In sum, according to statute and regulations, small business set asides are mandatory for acquisitions valued from \$3,000 to \$100,000 and take priority over GSA Schedule contracts," SBA wrote.

However, GSA took the opposite view in a Sept. 14 recommendation to GAO. "FSS ordering agencies are not required to set-aside *orders* for small businesses because FAR Part 19 is inapplicable to the ordering procedures set forth in FAR Subpart 8.4," the agency said. "GSA complies with FAR Part 19 prior to awarding FSS contracts," it explained, and, at the contract level, "has set-aside many supplies and services solely for small businesses."

GSA pointed out that the average size of an order under the FSS program is about \$50,000, and that the "vast majority of orders are under \$100,000." As a result, it said, "if all orders under \$100,000 have to be set aside for small businesses as long as there are at least two small businesses capable of doing the work, medium and large businesses would effectively be eliminated from the program."

Given that about 80 percent of the 13,000 contractors in the program are small businesses, firms "such as Dell, IBM, Home Depot, Office Depot, and Northrop Grumman, just to name a few, would see their business case for participating in the FSS program disappear," GSA said.

GSA's approach--applying FAR Part 19 set-aside requirements at the FSS *contract* level rather than the *order* level--"harmoniously construes potentially conflicting statutory provisions," the agency asserted.

FitNet Seeking Action by OFPP, Congress.

While GAO will not hear its protest, FitNet and the Fairness in Procurement Alliance (FPA)--which represents groups targeted by the small business set-aside program and was founded by FitNet founder Raul Espinosa--also have taken the issue to the Office of Federal Procurement Policy. In a Sept. 14 petition to OFPP, FPA asked OFPP Administrator Paul Denett to rescind FAR 8.404(a), 8.405, and 19.000(b) in light of SBA's Sept. 4 opinion to GAO.

"In that historic Legal Opinion, SBA confirmed my allegations that the 'set-aside exemptions' have no authority nor statute to exempt procurements and are, therefore unlawful and unenforceable," Espinosa wrote.

Espinosa also has gone to his congressman, Rep. John Mica (R-Fla.), who offered an amendment to the Small Business Contracting Program Improvements Act (H.R. 3867)

passed by the House Oct. 30 (see related story in this issue). Mica's amendment was aimed at ensuring that the Small Business Act's set-aside provisions are applied to FSS orders.

Raul Espinosa of FitNet represented the company in its GAO protest. Capt. Charles D. Halverson of the Army, Thedlus L. Thompson of GSA, and John W. Klein and Laura Mann Eyester of SBA represented their respective agencies. Paul N. Wengert and Ralph O. White of GAO participated in preparation of the decision.

The SBA and GSA responses to GAO and other materials related to FitNet's protest are available at: <http://fitnet.net/fpa/press/releases.html>.