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 United States Government Accountability Office
 Washington, DC 20548

Facsimile Transmission Sheet

Date: September 27, 2007

 Number of pages, including this cover sheet: **5**
Re: B-309911

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Protest of FitNet Purchasing Alliance

From: Paul N. Wengert, Attorney; Phone: 202-512-3781

Name	Firm/Agency	Phone	Fax
Raul Espinosa	FitNet Purchasing Alliance	904-599-9920	866-381-0908
Capt. Charles D. Halverson	Department of the Army	703-696-2846	703-696-1537
Thedlus L. Thompson, Esq.	General Services Administration	202-501-1147	202-501-0583
Laura Mann Eyester, Esq.	Small Business Administration	202-619-1801	202-481-4044

Dear Parties:

We would like to thank each of you—the protester, counsel for the Army, and counsel for the SBA—for participating in today's conference call. We recognize that it was, in some ways, a difficult call, but we felt it was necessary to keep all the parties focused only on the issues involving the procurement at issue in this protest.

The following remarks summarize several points raised by our Office during the call.

As we indicated, we think the protest filed by FitNet raises a matter of considerable interest to the government procurement community. If we conclude that the matter has been raised by a party with standing to raise it, we will decide the issue.

Please note that our comments during the call, and summarized here, are for purposes of discussion, and do not represent a decision by our Office on any issue. During the call, we expressed views on several contentions that have been raised. In brief summary, these were

- we do not agree with the Army that the matter here is answered by our prior decision *Global Analytic Info. Tech. Servs., Inc.*, B-297200.3, Mar. 21, 2006, 2006 CPD ¶ 53. In that case, we were not asked to review whether

FAR § 8.404(a) was in conflict with the requirements of the Small Business Act.

- we do not agree with the GSA that our Office lacks jurisdiction to review a question of whether a FAR provision conflicts with the requirements of the Small Business Act.
- we also think that the SBA brief urging our Office to sustain FitNet's protest appears thorough and well-argued.

That said, we think there may be valid questions about FitNet's "interested party" status, which must be answered for our forum to take jurisdiction of the protest. This is especially so since we have been advised by GSA (a copy of GSA's letter accompanies this fax) that FitNet does not have an FSS contract. The analysis leading to a conclusion that FitNet might not be an "interested party" to bring this case is as follows.

Under CICA, FSS contracts are placed on equal footing with bids and proposals as a competitive procedure. 41 U.S.C. § 259(b)(3); see also FAR § 6.102(a)-(d). In selecting a competitive procedure, however, the analysis does not end. (No one would suggest that once an agency decides to use bids or proposals, the agency is then exempt from complying with the requirements of the Small Business Act.) Since a decision to use the FSS is placed by statute on an equal footing with the decision to use bids or proposals, it seems the next step for any of these competitive procedures is to apply the overlay of the requirements of the Small Business Act.

In fact, CICA, on its face, apparently anticipates such an overlay; advising that an agency may exclude "other than small businesses in furtherance of sections 9 and 15 of the Small Business Act" (i.e., execute a small business set-aside) without following the J&A process established by CICA. See 10 U.S.C. § 2304(b)(2).

If, as this statutory scheme suggests, it is appropriate to first select a competitive procedure, and then address the requirements of sections 9 and 15 of the Small Business Act, FitNet would appear not to be an interested party to raise its main argument, because it does not participate in the competitive procedure chosen (i.e., the Federal Supply Schedule program). In that case, FitNet would appear to lack standing to challenge a decision not to set aside the procurement here.

In response to the concern raised by SBA during the call, we do not think this means that no small business will ever be able to raise the challenge FitNet raises. Rather, we envision that a small business FSS contract holder could argue that an FSS procurement must be limited to small business FSS contract holders (i.e., set aside) to comply with the requirements of the Small Business Act.

In addition, we think the situation here may be distinguishable from the reconsideration decision in the LBM case, which we also discussed during the call.

LBM, Inc., B-290682, Sept. 18, 2002, 2002 CPD ¶ 157. There, the Army's request for reconsideration argued that setting aside an order for small business schedule holders under LOGJAMSS was sufficient to comply with the requirements of the Small Business Act; we disagreed. Department of the Army—Request for Modification of Recommendation, B-290682.2, Jan. 9, 2003, 2003 CPD ¶ 23. We note that ordering under LOGJAMSS was not a “competitive procedure” under CICA in and of itself (unlike the FSS). The difference in status between LOGJAMSS and the FSS could call for a different result here.

Once again, our comments are not a decision on any issue in this protest. Rather, they are meant only to set forth possible lines of reasoning, and obtain the parties' views on the proper resolution.

Any written comments on these issues from the protester, the Army, the SBA, and the GSA should be filed by Friday, October 5, 2007 by 5:30 P.M. Eastern Daylight-Saving Time. A copy should be provided to each of the other parties contemporaneously.

Very truly yours,

Paul N. Wengert, Attorney

encl.



Fax

U.S. General Services Administration
www.gsa.gov

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To Paul N. Wengert, Esq.

Telephone 202-512-3781

Fax 202-512-9749

From Thedlus Thompson

Telephone (202) 501-1147

Fax (202) 501-0583

Subject Protest of FitNet Purchasing Alliance, B-309911

Comments

Mr. Wengert,

As stated in my voice mail message, I am forwarding an amended copy of the memorandum previously submitted in this matter, showing the correct date.

Thank you.

GSA Office of General Counsel
1800 F Street, N.W.
Washington, D.C. 20405

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GSA Federal Acquisition Service

September 27, 2007

Mr. Paul Wengert, Esquire
U.S. Government Accountability Office
Washington, DC 20548

Dear Mr. Wengert:

In response to your request, we have conducted a thorough review of our records to ascertain whether FitNet Purchasing Alliance holds any GSA Federal Supply Schedule contracts. We have determined that, to date, no Schedule contracts have been awarded to either FitNet Purchasing Alliance or FitNet International Corporation, the legal name of the company.

Sincerely,

for
Wend M Sade
Michael S. Sade
Assistant Commissioner
Office of Acquisition Management

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