



# Fax

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Subject Protest of FitNet Purchasing Alliance, B-309911

Comments

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GSA Office of General Counsel

**VIA FACSIMILE ONLY**

September 14, 2007

Paul Wengert, Esq.  
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Re: **Protest of FitNet Purchasing Alliance  
B-309911**

Dear Mr. Wengert,

On July 26, 2007, FitNet Purchasing Alliance (FitNet) filed a protest with the U.S. Government Accountability Office (GAO), challenging the U.S. Department of the Army (Army) decision not to set-aside a procurement for 50 wardrobe lockers for small businesses. Pursuant to the text of Solicitation No. SWCSKQ-7177-N035, only contract holders of General Services Administration (GSA) Federal Supply Schedule (FSS) contracts were eligible to participate. Subsequently, on August 13, 2007, the GAO requested that the GSA review and respond to the following issue:

*The protester essentially challenges the legal basis for the exemption from FAR Part 19 (and specifically the small business set-aside procedures) for purchases under the Federal Supply Schedule program, as contrary to the Small Business Act, 15 U.S.C. §644(j). This exemption is implemented at FAR §8.404(a) and FAR §8.405-5.*

GSA agrees with the Army's assertion [Agency Response, 8/17/07] that, pursuant to Federal Acquisition Regulation (FAR) § 8.404(a), 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. Although Subpart 8.4 is exempt from Part 19 applicability, this does not mean that Subpart 8.4 policies are contrary to the Small Business Act.<sup>1</sup>

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<sup>1</sup> GSA respectfully submits that that GAO is not the proper forum for review of this issue. However, since the issue is a significant one, GSA welcomes the opportunity to provide comments.

**First**, just as SBA's small business programs have a statutory mandate under 15 U.S.C. § 644, the FSS program (also known as the Multiple Award Schedule (MAS) Program) also has a statutory mandate pursuant to 40 U.S.C. § 501. Both FAR Subpart 8.4 procedures and "procurements conducted in furtherance of 15 U.S.C. § 644" are considered *competitive procedures*, enabling a Federal agency to procure its requirements pursuant to full and open competition. 41 U.S.C. § 259(b)(3) and (b)(4). However, the latter statute also requires that the "Multiple Award Schedule" program *be open to all responsible sources* and result in contracts and orders that provide the lowest overall cost alternative to meet the agency's needs. In attempting to reconcile both mandates, GSA *complies with FAR Part 19 prior to awarding FSS contracts*. In accordance with FAR Part 38, GSA complies with all applicable statutory and regulatory requirements, including those of FAR Part 19, during the acquisition planning stage prior to issuance of a FSS solicitation. Therefore, GSA has set-aside many supplies and services solely for small businesses.<sup>2</sup>

Where possible, seemingly contradictory statutory provisions should be construed harmoniously so as to give maximum effect to each provision. *Posadas v. National City Bank*, 296 U.S. 497 at 503; 53 Comp. Gen. at 856; B-208593.6, Dec. 22, 1988. By including text in FAR Subpart 8.4 that makes Part 19 inapplicable to FSS orders, the FAR has effectively harmonized these statutory provisions to give maximum effect to the policy mandates of both programs.

**Second**, FAR Part 19 and FAR Subpart 8.4 were promulgated in accordance with the rulemaking procedures delineated in the *Office of Federal Procurement Policy (OFPP) Act, Pub.L. 93-400, August 30, 1974, as amended*. Prior to issuance, these regulations were subject to public comment. In fact, the Small Business Administration (SBA) has historically been an active participant in the FAR rulemaking process, especially relating to FSS small business policies. FAR § 19.502-1(b) specifically exempts FSS contracts from application of § 19.502-2, *Total small business set-asides*. Since FAR regulations have the force and effect of law (See *Chrysler Corp.*, 441 U.S. at 403-303, n.31), FAR Subpart 8.4 provisions are entitled to the deference given by *Chevron*.

**Third**, as Army states in its Agency Response, GAO has consistently affirmed the validity of FAR Subpart 8.4 regulations. Neither the protester, nor SBA has provided sufficient rationale for deviating from the principle of *stare decisis*.

FAR Subpart 8.4 is entitled to due deference by GAO.

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<sup>2</sup> Examples of line items set-aside for small business include services under the Financial and Business Solutions (FABS) Schedule include; 520-10, Transportation Audits and 520-14, Audit and Financial Management Training Services. Schedule 711, Office Furniture and 711I, Household Furniture also contain line items set-aside for small business. Additional information regarding all small business set-asides may be found at *Schedules e-Library* on GSA's website – [gsa.gov](http://gsa.gov).

## 1) BACKGROUND

GSA administers the FSS program under the authority of *40 U.S.C. § 501 and Section 309 of the Federal Property and Administrative Services Act of 1949, as amended. (41 U.S.C. § 259(b))*. The FSS program provides Federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying. *FAR § 8.402*. Under this program, indefinite-delivery contracts are awarded using competitive procedures to firms. The firms provide supplies and services at stated prices for given periods of time. Federal agencies ordering goods and services from the FSS program must comply with the FAR Subpart 8.4 ordering procedures in order for the procurement to be in compliance with the Competition in Contracting Act (CICA).

The FSS program is uniquely structured to enable small businesses to compete for Federal contracts. While other procurements often require exhaustive, costly, and time consuming bid and proposal efforts, the FSS program affords both industry and the Government an efficient and effective means of competing requirements at the task level. To this end, GSA has implemented FSS policies and procedures that enhance procuring agencies' ability to target small business contractors. Such policies include the use of Contractor Teaming Arrangements (CTA)<sup>3</sup> and Blanket Purchase Agreements (BPA) (*FAR § 8.405-3*) that allow small businesses to establish relationships with industry partners to compete for requirements that the small business would not otherwise be capable of performing. Also, the FAR now applies provisions restricting bundling to FSS orders.<sup>4</sup> Small business contractors received 37.6 percent of the dollars awarded under the FSS program in Fiscal Year 2006. To date, Fiscal Year 2007 small business sales under the FSS program exceed \$13 billion dollars.

The average size of an order under the FSS program is approximately \$50,000, which means that the vast majority of orders are under \$100,000. The FSS program has approximately 13,000 contractors of which approximately 80% are small businesses. As a result, 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. 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. Not only would this reduce competition and increase costs to agencies, it would also negatively impact those small businesses who are part of large business subcontracting plans or who participate in teaming arrangements with large and medium sized businesses under the FSS program. The loss of large and medium sized businesses under

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<sup>3</sup> See additional information regarding CTAs on GSA's website at [gsa.gov](http://gsa.gov)

<sup>4</sup> See FAR § 7.204(d) and § 7.107. These sections mitigate the impact on small businesses, both when agencies choose to use orders against IDIQ contracts and when establishing a new contract to which small business set-asides is applicable.

the FSS program would have long term negative consequences for small business. The loss of these important sectors from the FSS program would ultimately reduce the volume of purchasing under the program, thereby reducing overall opportunities for small businesses.

The FSS program has a record of small business support second to none in the federal marketplace. Small businesses have received approximately 80% of the contracts awarded under the GSA Schedules Program.<sup>5</sup> Small businesses received over 35% of the \$36 billion in sales in FY06. These numbers far exceed the government-wide goal of 23% and have consistently increased over the previous five years. This record is built on creating incentives for using small businesses rather than mandates. Under the FSS program, agencies can get credit towards their socio-economic goals for orders placed with small businesses. Furthermore, FAR § 8.405-5 encourages all agencies to consider at least one small business prior to placing an order under the program. Agencies are advised that they may establish evaluation criteria which give weight to socio-economic factors in their best value analysis. By encouraging agencies to consider small businesses and allowing credit towards socio-economic goals, the Schedules program has successfully used a market-based approach to creating small business opportunity.

The pertinent issue is not *whether* small businesses should be assisted under FSS program, but *how*.

**2) FAR SUBPART 8.4 REASONABLY IMPLEMENTS APPLICABLE STATUTES, *THUS*, THIS FAR PROVISION IS ENTITLED TO *CHEVRON* DEFERENCE.**

*Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) provides the standard of review regarding a challenge to the rulemaking process.<sup>6</sup> If Congress "has directly spoken to the precise question at issue" and its intent is clear, then "the court, as well as the agency, must give effect to [that] unambiguously expressed intent." *Id.* at 842-843. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute". If it is, the Court must defer to the agency's construction. See *Id.* Further, "The FAR regulations are the very type of regulations that the Supreme Court in *Chevron* and later cases has held should be afforded deference", *Brownlee v. DynCorp.*, 349 F.3d 1343, 1354 (Fed. Cir. 2003).

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<sup>5</sup> As an example of the extent of small business participation in the FSS program, ten of the 12 FSS contractors providing wardrobe lockers (the subject of the Army procurement) are small businesses. (SIN 71-309).

<sup>6</sup> It is recognized, of course, that GAO is not part of the judiciary, however the analogy is appropriate.

Based on the *Chevron* standard, the FAR reasonably exempted FAR Subpart 8.4 orders from the applicability of FAR 19 small business programs.

**a) FAR SUBPART 8.4 HARMONIOUSLY CONSTRUES POTENTIALLY CONFLICTING STATUTORY PROVISIONS**

As stated previously, *41 USC 259(b), Competitive Procedures*, applies equally to FAR Part 19 small business set-asides and FAR Subpart 8.4 ordering procedures. The relevant provisions read:

- (b) The term "competitive procedures" means procedures under which an executive agency enters into a contract pursuant to full and open competition. Such term also includes-.....
  - (3) the procedures established by the Administrator for the multiple awards program of the General Services Administration if –
    - (A) participation in the program has been open to all responsible sources; and
    - (B) orders and contracts under such procedures result in the lowest overall cost alternative to meet the needs of the Government;
  - (4) procurements conducted in furtherance of section 644 of Title 15 as long as responsible business concerns that are entitled to submit offers for such procurements are permitted to compete;.....

Neither *15 U.S.C. § 644* nor *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.<sup>7</sup> Historically, the FAR has *always* provided for the applicability of FAR Part 19 provisions at the *contract* level. For the FSS program, FAR Part 19 provisions are applicable prior to contract award, as set forth in FAR Part 38.<sup>8</sup> As will be discussed in greater detail in the following section, the FAR frequently balances the needs of different programs during the rule-making process. This balancing of agency needs is in accordance with the rule of statutory construction that dictates that statutes be construed harmoniously so as to give maximum effect to both wherever possible. *Posadas v. National City Bank*, 296 U.S. 497 at 503; *53 Comp. Gen. at 856; B-208593.6, Dec. 22, 1988*. GAO should defer to this FAR construction.

<sup>7</sup> As an example of the complexity of such issues, see recently-published SBA regulations regarding size status within multiple-award contract vehicles such as the MAS program. *Small Business Size Regulations: Size for Purposes of Government-Wide Acquisition Contracts, Multiple Award Schedule Contracts and Other Long Term Contracts*, 71 FR 66434-01, November 15, 2006.

<sup>8</sup> It is important to note that FAR § 38.201(e) now provides specific references to the inapplicability of FAR Part 19.

## **b) THE OFPP ACT REQUIRES FAR OFFICIALS TO RESOLVE DIFFERENCES IN THE DEVELOPMENT OF PROCUREMENT REGULATIONS**

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. OFPP was established in the Office of Management and Budget in order to provide overall direction of Government-wide procurement policies. (*Pub. L. 93-400, as amended by Pub. L. 96-83, 41 USC 404(a)*). 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*). Among its duties as policy overseer, OFPP is responsible for providing leadership in resolving differences among executive agencies in the development of simplified Government-wide procurement regulations. *41 USC § 405(d)*. Also, in 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 coordinated action of two councils, the Civilian Agency Acquisition Council (CAAC), which GSA chairs, and the Defense Acquisition Regulations Council (DARC). Both the CAAC and the DARC include agency representatives with superior acquisition experience. *FAR §1.201-1*. 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 both the CAAC and the DARC in accordance with the procedures set forth in 1.201-1. Regulatory history shows that the FAR text in question has never materially changed since its first issuance in 1989.<sup>9</sup>

Although the FAR was first published on September 19, 1983, language in FAR 8.404(a) regarding the inapplicability of "small business – small purchase" set-aside procedures" to FSS orders first appeared in 1989. (*54 FR 29280*):

### **8.404 Using schedules**

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<sup>9</sup> Although GAO cites FAR § 8.405-5 as well as § 8.404, GSA's discussion focuses solely upon § 8.404 since § 8.405-5(a) re-iterates the rule that FAR Part 19 preference programs do not apply.

“(a) The planning, solicitation, and award phases of Federal Supply Schedules comply with FAR requirements. Consequently, contracting officers need not seek further competition, synopsise the solicitation or award, determine fair and reasonable pricing, or consider small business – small purchase set aside procedures when placing an order under a Federal Supply Schedule.”

Subsequently, in 1995, the text of 8.404(a) was expanded. (61 FR 39190).

#### **8.404 Using schedules**

(a) General. When agency requirements are to be satisfied through the use of Federal Supply Schedules as set forth in this Subpart 8.4, the policies and procedures of FAR Part 13 do not apply. When placing orders under a Federal Supply Schedule, ordering activities need not seek further competition, synopsise the requirement, make a separate determination of fair and reasonable pricing, or consider small business set-asides in accordance with Subpart 19.5.

On March 4, 1999 (64 FR 10536), the text was amended as follows:

#### **8.404 Using schedules**

(a) General. When agency requirements are to be satisfied through the use of Federal Supply Schedules as set forth in this subpart, the simplified acquisition procedures of Part 13 and the small business provisions of Part 19 do not apply, except for the provisions of 13.302(c)(3). Orders placed pursuant to a Multiple Award Schedule (MAS) using the procedures in this subpart, are considered to be issued pursuant to full and open competition (see 6.102(d)(3)). Therefore, when placing orders under Federal Supply Schedules, ordering offices need not seek further competition, synopsise the requirement, make a separate determination of fair and reasonable pricing or consider small business programs. ....

The last relevant changes to this text occurred in 2002 (76 FR 56119).

#### **8.404 Using schedules**

(a) General. (1) Parts 13 and Part 19 do not apply to orders placed against Federal Supply Schedules, except for the provisions at 13.302-2(c)(3)...

(i) Ordering offices need not seek further competition, synopsise the requirement, make a separate determination of fair and reasonable pricing or consider small business programs.

The regulatory history makes clear that not only has the FAR Council considered the applicability of FAR Part 19 business programs to FAR Subpart 8.4 orders on numerous occasions, the Council has, over time, expanded and clarified the language regarding the inapplicability of Part 19. Further, the intent to exempt FSS orders from applicability of small business set-asides is seen not only in Subpart 8.4, but also in FAR Part 19 itself.

Although FAR § 19.502-2 sets forth the requirement of total small business set-asides, the previous section, 19.502-1(b), expressly exempts FSS orders from this requirement. The existence of a FAR Part 19 provision that exempts FAR Subpart 8.4 orders from set-asides is a strong indication of the extensive review given to this issue by the FAR Council and gives credence to fact that the exemption is not contrary to the Small Business Act. The promulgation of a single system of Government-wide procurement regulations frequently requires the balancing of the needs of various programs during the rule-making process. This "balancing act" is anticipated by the OFPP Act and the FAR Council has been given the authority to resolve disputes that arise.

### 3) THE RULE OF *STARE DECISIS* COMPELS GAO TO UPHOLD THE VALIDITY OF FAR SUBPART 8.4 REGULATIONS<sup>10</sup>

*Global Analytic Information Technology Services, Inc.* (Global) B-290720.3, March 21, 2006, is the most recent GAO decision to address the applicability of small business set-asides to FAR Subpart 8.4 purchases. Although the decision was issued in the context of FAR Subpart 8.4's exemption from application of FAR 19.506 small business set-aside withdrawal requirements, GAO's holding was broadly worded to state that "*the agency was not required to set the requirement aside in the first instance...*". As previously cited by the Army in its Response, the holding in *Global* is not new, rather there are a host of decisions providing precedent in this matter.<sup>11</sup> Of particular note is the holding in *Future Solutions, Inc.*, B-293194, Feb. 11, 2004, 2004 CPD P39.

The protester in *Future Solutions, Inc.* argued that the Environmental Protection Agency's should have obtained its requirement for office supplies through a small business set-aside rather than utilizing the FSS program. In denying the protest, GAO's decision states, in relevant part:

*"However, no statute or regulation [emphasis added] required the agency to set aside this requirement for small businesses in lieu of purchasing from FSS vendors. Indeed, FAR § 8.404(a)(1) as it read when the solicitation for this BPA was issued, provided in pertinent part: Parts 13 [simplified acquisition procedures] and 19 [small business programs] do not apply to orders placed against [FSS].... This provision obviates the need for agencies to apply small*

<sup>10</sup> GSA again notes that in following its own precedents, GAO follows the legal principle of *stare decisis*. Thus, it has relevance to this GAO proceeding.

<sup>11</sup> See also *Millennium Data Systems, Inc.*, B-292357.2, March 12, 2004.

*business set-aside procedures, where, as here, they are purchasing from the FSS."*

Even though the procurement at issue in *Future Solutions* exceeded \$100,000, there is no reason to conclude that the rationale for GAO's decision is inapplicable to procurements valued between the micro-purchase threshold and \$100,000 (see 19.502-2). As the excerpt from the decision makes clear, FAR 8.404(a)(1) exempted FSS orders from *all portions* of Part 19. GAO's decision, therefore, applies to all FAR Part 19 small business set-asides, regardless of value. No other reasonable interpretation is possible.

GAO has previously opined that a determination of law should be followed unless it has been overruled by a subsequent decision, statute or regulation. *Manufacturing Technology Solutions – Request for Reconsideration*, B-237415, B-237415.2, May 4, 1990, 90-1 CPD P 447. Since FAR Subpart 8.4 has the force and effect of law and no regulatory change has occurred since GAO's decision in *Global*, the holding in *Global* should be binding precedent.

#### 4) CONCLUSION

As stated above, the FAR reasonably exempted Subpart 8.4 purchases from the applicability of Part 19 small business programs. In accordance with the OFPP Act, the FAR has historically provided for application of Part 19 small business programs to FSS contracts, and *not orders*, through procedures that balance the program needs of SBA and GSA. FAR regulations are the very type of regulations that should be given deference. Thus, the protester's challenge to the legal basis for the exemption has no merit.

GSA appreciates the opportunity to provide comments on this matter.

Sincerely,



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