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Subject Protest of FitNet Purchasing Alliance, B-309911

Comments

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GSA Administrator

VIA FACSIMILE ONLY

October 5, 2007

Paul Wengert, Esq.
Office of the General Counsel
U.S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Re: **Protest of FitNet Purchasing Alliance
B-309911**

Dear Mr. Wengert,

Your September 27, 2007, facsimile to the protester and counsels for the Department of the Army (Army), the Small Business Administration (SBA) and the General Services Administration (GSA), summarized the issues raised by the Government Accountability Office (GAO) during the conference call held earlier that day. The facsimile also indicated GAO's willingness to receive any written comments on the issues presented. Accordingly, GSA provides the following additional comments for GAO's consideration to supplement the initial September 14, 2007 submittal.

I) The Protest Should Be Dismissed Since FitNet Purchasing Alliance (FitNet) Is Not An Interested Party As Required By GAO Regulations.

As GAO implies in its 9/27/07 facsimile, FitNet has no standing to challenge the Federal Supply Schedule (FSS) ordering procedures in FAR Subpart 8.4 because FitNet does not have a FSS contract.¹ Therefore, FitNet could not receive an order regardless of the decision rendered by GAO, and thus FitNet has no economic interest in the Army's procurement. Pursuant to 4 CFR § 21.0 (a)(1), an *interested party* means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. A firm that does not have an FSS contract is not an interested party to file a protest with GAO challenging an agency's determinations in the context of an FSS purchase pursuant to FAR Subpart 8.4.

¹ FSS contracts are also known as Multiple Award Schedule (MAS) contracts.

Savantage Financial Services, Inc., B-284943; B-284943.2, 2003 CPD P113, Comp. Gen., June 11, 2003; Sales Resources Consultants, Inc., B-284943, B-284943.2, 2000 CPD P102, June 9, 2000. On 9/27/07, GSA submitted a memorandum stating that, as of that date, "...no [FSS] Schedule contracts have been awarded to either FitNet Purchasing Alliance or FitNet International Corporation, the legal name of the company". Accordingly, because FitNet does not hold an FSS Schedule contract, FitNet does not qualify as an interested party to challenge Army's determination not to set-aside the order for small business, and the protest must be dismissed.

Furthermore, FitNet cannot be deemed an interested party as a prospective offeror. In order for FitNet to make such an argument, FitNet would have been required to protest prior to the closing date. The Army solicitation expressly stated that bidding was only open to GSA Schedule holders. Accordingly, the solicitation was clear on its face in this regard, and FitNet was required to make any such assertion on or before the closing date as required by GAO's bid protest regulations on timeliness. See 4 CFR 21.2(a)(1).

II) GAO Lacks Jurisdiction And Can Not Provide The Relief Sought By The Protester

As GSA noted in its initial submission, GAO is not the proper forum for review of this issue because, in order to give the relief requested (if FitNet were an interested party which it is not), GAO would need to render a regulation, namely Federal Acquisition Regulation (FAR) provisions, invalid.

GAO is an arm of the Congress and its protest jurisdiction initially derived from its authority to settle claims against the Government and later from explicit statutory authority. 31 U.S.C. § 3552. GAO's protest decisions, however, are recommendations. The *Centech Group, Inc. v. United States*, No. 07-513C, U.S. Court of Federal Claims, September 27, 2007. Because the Comptroller General may only "recommend" a remedy upon finding a procurement violation, GAO's rulings do not legally bind the parties to a bid protest. *Id.* Neither the agency nor this [Federal] court is bound by the determination of the GAO. See *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 339, 341 (1997).

The Office of Federal Procurement Policy (OFPP) Act provides for resolution of challenges to the validity of FAR regulations. Pursuant to 41 U.S.C. § 421(c)(4), petition may be made to the Administrator of OFPP to review a regulation that is considered inconsistent with the FAR or inconsistent with OFPP policies. As deemed necessary, the Administrator is authorized to take such action as permitted under 41 U.S.C. § 405.

III) Even If The Protest Is Reviewed On Its Merits, GAO Should Give Deference To The Federal Acquisition Regulation (FAR) Rulemaking Process And Uphold The Validity Of FAR Subpart 8.4

GSA reiterates its position, as stated in its initial submittal, that FAR Subpart 8.4 regulations should be given deference. Just as the judiciary gives deference to FAR regulations in regards to validity, so should GAO. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) states, "We [Supreme Court] have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." The FAR regulations are the very type of regulations that *Chevron* and later cases has held should be afforded deference. *Brownlee v. Dyncorp*, 349 F.3d 1343, 1354 (2003).

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 FAR Council is responsible for administering the FAR. Under the Office of Federal Procurement Policy (OFPP) Act (41 U.S.C. 405a, Title II, § 222 of Pub. L. 95-507), the Administrator of OFPP is authorized and directed to promulgate a single, simplified, uniform Federal procurement regulation. GSA, DoD and NASA are jointly tasked with the preparation, issuance and maintenance of the FAR. (41 U.S.C. § 405, 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)(1)). In carrying out its duties, OFPP is specifically directed to develop policies, in consultation with the Small Business Administration, that ensure that small businesses are provided with the "maximum practicable opportunities to participate in procurements that are conducted for amounts below the simplified acquisition threshold". 41 U.S.C. § 405(d)(11). Despite the language of 15 U.S.C. § 644(j), it is clear that the FAR Council has considerable authority in determining small business policy within FAR regulations.²

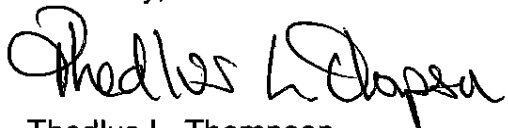
Congress has specifically authorized GSA to administer the FSS program and has specifically authorized the FAR Council to promulgate the FAR. Both GSA and the FAR Council have been entrusted to administer the FAR provisions relating to FAR Subpart 8.4. Therefore, GAO's standard of review must recognize substantial executive branch discretion in the promulgation of the FAR.

² "If the plain language of a statute would lead to an unintended result, one may look beyond the plain language in order to ascertain the meaning of the statute". *Matter of: Norton Company, Safety Products Division*, 60 Comp. Gen 341, 346 (Apr. 1, 1981). As alluded to in GSA's previous memorandum, the complexity of small business issues within multiple-award contract vehicles could not have been contemplated by Congress when the Small Business Act was first enacted.

For the reasons stated above, this protest must be dismissed. If GAO does not dismiss the protest, the GAO should give deference to the FAR regulations and deny the protest.

GSA appreciates the opportunity to provide additional comments on this matter.

Sincerely,



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cc: (by facsimile)

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