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REQUEST FOR RECONSIDERATION OF DECISION TO DISMISS PROTEST

To: Paul Wengert Fax: 202.512.9749

Company Government Accounting Office eMail: wengertp@gao.gov

From: Raul Espinosa Date: November 9th, 2007

Re: Protest B-309911 - Appeal for reconsideration of Decision of November 2nd, 2007 to Dismiss Protest Pages: 5

cc: Charles Halverson, Esq., (Army); Michael Tully, Esq; (GSA); Laura Mann Eyester, Esq., (SBA);

On November 2nd, 2007, GAO dismissed my protest with the U.S. Government Accountability Office (GAO) concerning Solicitation No. SWCSKQ-7177-N035, issued by the U.S. Department of the Army (Army) *through the FedBid private reverse auction procurement vehicle (Buy # 43672)* which FitNet has filed with GAO in order to challenge the rights of an Agency to exempt the statutory rights of small businesses in a procurement under \$100,000 as (1) required by Congress and (2) stipulated by SBA on their Sept. 4th ruling.

In the dismissal decision, GAO cited the following *“the protester does not hold an FSS contract, and therefore is not an interested party to pursue this matter... 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.”*

In my protest, I had articulated that *“reverse auctions, among other things, have unique processes which are not adequately addressed by the current FAR.”* Some of these processes, actually, contradict what FAR stipulates.

In my protest I even submitted a list of 10 separate processes ¹ to demonstrate the discrepancies and assist GAO improve this excellent procurement vehicle. For the record, reverse auctions - in the opinion of many advocates - hold the future for government procurement. GAO, in their decision to dismiss my protest, ignored this crucial issue altogether..

I am herewith requesting for GAO to reconsider its dismissal of my protest, precisely because GAO failed to take into account the discrepancies I had cited between the FAR, on the one hand, and the 'regulations' governing the private FedBid reverse auction vehicle on the other:

Title 4 of the Code of Federal Regulations (C.F.R.), Part 21 § 21.0 (a)(1) defines an 'Interested party' for the purpose of filing a protest as *"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."* According to SBA, to attorneys and to Congressional authorities consulted on this subject, FitNet is an interested party because *I could have submitted a compliant bid under the FedBid Buy #43672 private reverse auction and, if I could have submitted a compliant bid, I could have also challenged a decision not to set aside an individual order.*

I will demonstrate – in non legalese language - how the GAO assumptions used to dismiss my protest were factually wrong:

¹ [Reverse Auction Issues Requiring Regulatory Reform](#)

factual grounds upon which reversal is deemed warranted

“the protester does not hold an FSS contract, and therefore is not an interested party to pursue this matter... 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.”

The GAO’s assumptions applies solely to standard government procurements (i.e., RFP, RFQ). These standard procurements offer no transparency of any sort. They are never announced nor are they even posted on fedbizopps. The only party(ies) who knows about the procurement is the supplier(s) chosen to bid and/or to fulfill the contract. No-one else, therefore, could even challenge such procurements nor their irregularities. It would be not only unfair, but unethical to give a false impression - in the GAO decision, that suppliers – under the GSA arrangement – could initiate a challenge.

In summary, the GAO assumption used to dismiss my protest [does not apply to the private FedBid reverse auction](#). FedBid has its own regulations; which – among other things – provide the type of transparency demanded by both Congress and by OFPP on public procurements. This means that their procurements are announced and bidders can challenge them – as they should – if they appear to be unjust, unethical and/or in violation of standard procurement practices, not to mention the FAR.

Additionally, FedBid allows *teaming arrangements among the bidders including those with and without GSA Contracts*. *On procurements reserved for ‘GSA Bids’, and I shall point out that these are NOT ‘among GSA Schedule holders’ the FedBid requirement is that the commodity being offered must be on a FSS Schedule AND not necessarily the prime bidder responding to the auction.r.* On FedBid Buy # 43672, therefore, which was reserved for ‘GSA Bids,’ a non-schedule holder (i.e., FitNet) could have been the respondent by teaming up with a GSA Schedule holder – in accordance with the FedBid’s own regulations – and offer the ‘lockers’ requested as long as those lockers were on the FitNet’s team partner’s GSA Schedule.

Since the above rationale proves that FitNet, a non-FSS contract holder could have responded to the solicitation by teaming up with a FSS contract holder and submit a bid on Buy 43672, the GAO assumption that *"FitNet is not an interested party to challenge a decision not to set aside an individual order"* is **factually incorrect.**

Protester FitNet, therefore, requests that GAO reverse its decision to dismiss my protest and re-instate the protest. Furthermore, should GAO, then rules in my favor, Protester FitNet requests for the Controller General to advice GSA to amend the solicitation and restrict the competition to small businesses. Additionally, to advice OFPP of its decision to facilitate OFPP to take the steps required to eliminate and/or rescind the exemption. Protester also requests that it be reimbursed for all costs incurred in connection with the pursuit of this protest including reasonable attorney fees and documented costs incurred by the protester in pursuit of a resolution of this protest.

I wish to inform GAO, should it chooses to uphold its earlier position to avoid a ruling by claiming that FitNet did not have standing to file the protest, that a GAO ruling is now going to be required regardless of my standing. In accordance with GAO Order No. 0130.1.10 (April 5th, 2004) – I have requested the intervention of both a Congressional Committee Chairman and the SBA Administrator to cause for such a GAO to rule on the case

The **real issue** in this protest, again, is the injustice of allowing a regulation without authority to exempt (in the legislation, which created the GSA Schedule) nor statutory grounds, to have been written into the FAR. Government regulators allegedly took advantage of our community's lack of legal representation and resources to promote, at our expense, a government procurement vehicle. This illegal regulation has allowed

the diversion of billions in federal contracts away from small businesses as mandated by Congress and the regulation must cease to influencing future public procurements.

I have offered GSA the assistance and cooperation of the Fairness in Procurement Alliance (FPA), which I had founded, to address the obvious need to re-align the procurement landscape, but not before the 'GSA exemption, is removed. Please kindly issue the GAO opinion to facilitate this process.

The following link, for the record, contains all the filings regarding this case:

<http://fitnet.net/fpa/press/releases.html>

Thank you for the opportunity to make a difference,

A handwritten signature in black ink, appearing to read "R. Espinosa", written in a cursive style.

Raul Espinosa
President

cc. Sen. John Kerry, Chairman, Small Business Entrepreneurship Committee
Sen. Olympia Snow, Ranking Mbr., Small Business Entrepreneurship Committee
Cong. Nydia Velazquez, Chairperson, Committee on Small Business
Cong. Steve Chabot, Ranking Member, Committee on Small Business
Cong. John Mica, Member, Government Reform Committee
Paul Dennett, Administrator, Office of Federal Procurement Policy
Thomas Sullivan, Office of Advocacy
Advocacy Trade Groups and VIPs