

OFFICE OF THE GENERAL COUNSEL
DEPARTMENT OF DEFENSE EDUCATION ACTIVITY

FACSIMILE TRANSMITTAL SHEET

TO:	FROM:
Raul Espinosa	Brian C. Barry
President, F/Net Purchasing Alliance	DATE: 11/5/2007
FAX NUMBER: (866) 381-0908	TOTAL NO. OF PAGES INCLUDING COVER: 8
PHONE NUMBER: (904) 599-9920	
RE: B-310669 + B-310730	

URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY PLEASE RECYCLE

NOTES/COMMENTS:

Attached, please find DoD Education Activity's Motion to Dismiss in regards to the above referenced protests (B-310669 + B-310730).

A hard-copy will follow via Fed Ex (w/ attachments).

This was filed at the GAO today.

Regards

Brian C. Barry (Brian C. Barry)

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DEPARTMENT OF DEFENSE
EDUCATION ACTIVITY
OFFICE OF THE GENERAL COUNSEL
4040 NORTH FAIRFAX DRIVE
ARLINGTON, VIRGINIA 22203

November 5, 2007

VIA FACSIMILE (without Attachments to Enclosure)
HARD COPY VIA HAND DELIVERY (with Attachments to Enclosure)

Paula A. Williams, Senior Attorney
U.S. Government Accountability Office
Office of General Counsel
441 G Street, N.W.
Washington, D.C. 20548
Tel: (202) 512-4788
Fax: (202) 512-9749
Case Status: (202) 512-5436

Re: B-310669 and B-310730, Protests of FitNet Purchasing Alliance

Dear Ms. Williams:

The Department of Defense Education Activity (the "Agency") hereby submits its Motion to Dismiss in response to the above-referenced protests.

Furthermore, in accordance with 4 C.F.R. § 21.3(f), the Agency respectfully requests an extension of time for the submission of the Agency Reports currently due on November 16, 2007, until a decision has been issued on the Motion to Dismiss. All parties are being notified of this request for an extension by receipt of this letter and, in accordance with the GAO Bid Protest Regulations, should communicate directly with your office in connection with the protest.

Finally, this is to notify you that I will be serving as the Agency Representative in this matter. My contact information is:

Brian Berry
Assistant General Counsel
Department of Defense Education Activity
4040 N. Fairfax Drive
Arlington, VA 22203
703.588.3062 – Tel
703.588.3707 – Fax
brian.berry@hq.dodea.edu

Sincerely,



Brian Berry
Assistant General Counsel
Department of Defense Education Activity

Encl: Government's Motion to Dismiss (without Attachments)

cc: via Facsimile (without Attachments to Enclosure)
and Hard Copy via Federal Express (with Attachments to Enclosure) to:

Raul Espinosa, FitNet Purchasing Alliance

GOVERNMENT ACCOUNTABILITY OFFICE

Protests of FitNet Purchasing Alliance)	
)	
Agency: Department of Defense Education Activity)	Case No: B-310699
)	&
Solicitation No.: HE 1260-07-T-2007 and HE 1260-07-2008)	Case No: B-310730
)	
GAO Attorney: Paula A. Williams)	

GOVERNMENT'S MOTION TO DISMISS

Introduction

The Department of Defense Education Activity ("DoDEA") hereby submits its motion to dismiss the above referenced protests filed by the FitNet Purchasing Alliance (FitNet). On November 17, 2007, FitNet submitted a protest of two DoDEA solicitations, HE 1260-07-T-2007 and HE 1260-07-T-2008 (collectively, the "Solicitations"), via a single email to the Government Accountability Office (GAO). The GAO later separated the initial protest into two case numbers, B-310699 (the protest of solicitation HE 1260-07-T-2007) and B-310699 (the protest of solicitation HE 1260-07-T-2008); however, FitNet's protest of each solicitation is identical and contained within a single filing. In its protest filing, FitNet alleges that the Solicitations should have been set aside for small businesses, and therefore, that the unrestricted nature of the Solicitations is improper. DoDEA requests that both of FitNet's protests be dismissed as FitNet has failed to state legally sufficient grounds for its protests.

Relevant Factual and Procedural Background

DoDEA serves the educational needs of the dependents of military and civilian employees by providing instruction to approximately 89,000 students in seven states, twelve foreign countries, Guam and Puerto Rico. DoDEA is divided into three administrative areas, one of which is the DoD Dependent Schools – Pacific/ Domestic Dependent Elementary and Secondary Schools – Guam (“DoDDS-P/ DDESS-Guam”). DoDDS-P/ DDESS-Guam includes the geographical areas of Korea, Japan and Guam.

On October 10, 2007, DoDDS-P/ DDESS-Guam issued a Request for Quotations (RFQ) for 60 pre-assembled gym lockers, which was assigned the solicitation number HE1260-07-T-2007. Attachment 1. Solicitation HE1260-07-T-2007 identified the acquisition as being unrestricted (i.e., not a set-aside), based on the fact that the lockers were being purchased for use in a middle school in Okinawa, Japan. Attachment 1 at 1. That the lockers were for use in Okinawa, Japan is clearly noted in the pre-solicitation notice for Solicitation HE 1260-07-T-2007, published on August 14, 2007. Attachment 2 at 1.¹

On October 11, 2007, DoDDS-P/ DDESS-Guam issued a RFQ for 450 pre-assembled clothing lockers, which was assigned the solicitation number HE1260-07-T-2008. Attachment 4. Solicitation HE1260-07-T-2008 identified the acquisition as being unrestricted (i.e., not a set-aside), based on the fact that the lockers were being purchased for use in a middle school in Okinawa, Japan. Attachment 4 at 1. That the lockers were

¹ Solicitation HE1260-07-T-2007 was amended on November 2, 2007, to extend the date for receipt of quotations indefinitely. Consistent with the pre-solicitation notice, the amendment also highlighted that the lockers are being procured for a middle school in Okinawa, Japan. See Attachment 3.

for use in Okinawa, Japan is clearly noted in the pre-solicitation notice for Solicitation HE 1260-07-T-2008, published on August 14, 2007. Attachment 5 at 1.²

By email dated October 17, 2007, FitNet submitted a protest filing at the GAO stating that the Solicitations, “must, by statute, be restricted as ‘set-aside for small-businesses’ in accordance to FAR Part 19.[sic] and the Small Business Act.” FitNet Protest ¶ 1. FitNet also requested that the GAO, “rule on the legality of the ‘foreign’ exemption [FAR 19.000(b)].” FitNet Protest ¶ 2.

FitNet Has Failed To State Legally Sufficient Grounds For Protest

While FitNet’s protest filing does not set forth a clear or detailed statement of the legal grounds upon which it is based, it appears that FitNet may be attempting to argue two contrasting lines of thinking: that Federal Acquisition Regulation (FAR) Part 19 mandates that the Solicitations be set aside for small business, and that FAR Part 19’s explicit jurisdictional limitations are illegal. Neither of the arguments has merit.

In its protest filing, FitNet first argues that the Solicitations “must, by statute, be restricted as ‘set-aside for small businesses’ in accordance to FAR Part 19.” FitNet Protest ¶ 1. However, contrary to FitNet’s assertion, FAR Part 19 explicitly states that it “applies *only* in the United States or its outlying areas...”³ See 48 C.F.R. § 19.000(b) (emphasis added). As such, the small business set-aside programs described in FAR Subpart 19.5, “Set Asides for Small Business” (48 C.F.R. Subpart 19.5), are not

² Solicitation HE1260-07-T-2008 was amended on November 2, 2007, to extend the date for receipt of quotations indefinitely. Consistent with the pre-solicitation notice, the amendment also highlighted that the lockers are being procured for a middle school in Okinawa, Japan. See Attachment 6.

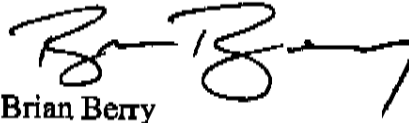
³ There is one exception to the limitation that FAR Part 19 applies only to the United States or its outlying areas; FAR Subpart 19.6, Certificates of Competency and Determinations of Responsibility (48 C.F.R. 19.6), which applies worldwide. FAR Subpart 19.6 is inapplicable to the protest at hand.

applicable to either of the Solicitations for lockers with a final destination of Okinawa, Japan – Japan being neither a part of the United States nor its outlying areas.

Fitnet's protest filing also includes a request that the GAO "rule on the legality of the 'foreign' exemption [FAR 19.00(b)]...". FitNet Protest ¶ 2. However, FitNet fails to explain what it means when it uses the term "foreign exemption," and fails to offer any legal argument in support of its request that the GAO rule on its legality. If FitNet is arguing that FAR Part 19 actually applies worldwide, and that anything less than worldwide application amounts to a "foreign exemption," its argument must fail. The plain meaning of the language found in FAR Part 19 ("This part, except for subpart 19.6, applies *only in the United States or its outlying areas*. Subpart 19.6 applies worldwide."), excludes FAR Part 19's application to foreign purchases. See *American Eagle Industries, Inc.; Yellowhorse, Joint Venture*, B-255251, B-255251.2, Feb. 22, 1994, 94-1 CPD ¶ 128 at 3 ("[GAO] focuses on the 'plain meaning' of language when determining the proper interpretation of a statute or regulation."). Alternatively, if FitNet is making a frontal challenge to the legality of the limitations set forth in FAR Subpart 19.000(b), that argument must also fail, as such a request is not properly made to the GAO. Either way, FitNet's protest filing fails to "be concise and logically arranged," and does not "clearly state legally sufficient grounds of protest," as is required by the GAO's Bid Protest Regulations. See 4 C.F.R. § 21.1 (f). As such, the protests should be dismissed. See 4 C.F.R. § 21.5 (f).

For the foregoing reasons, DoDEA requests that FitNet's protests be dismissed.

Respectfully submitted,



Brian Berry
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Tel: (703) 588-3062
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Dated: November 5, 2007