



Decision

Matter of: FitNet Purchasing Alliance

File: B-406075

Date: February 3, 2012

Raul Espinosa for the protester.

MAJ James W. Nelson, Department of the Army; Michael D. Tulley, Esq., General Services Administration; and John W. Klein, Esq., and Laura Mann Eyester, Esq., Small Business Administration, for the agencies.

Pedro E. Briones, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging an agency's decision not to set aside for small businesses an order under the Federal Supply Schedule (FSS) program is dismissed where the protester does not hold an FSS contract, and therefore is not an interested party to pursue this matter.

DECISION

FitNet Purchasing Alliance, a small business located in Saint Augustine, Florida, protests the terms of request for quotations (RFQ) No. W911RZ-12-T-0001, issued by the Department of the Army for a reverse auction among vendors holding Federal Supply Schedule (FSS) contracts for fitness equipment. FitNet argues that this requirement should be set aside for small businesses.

We dismiss the protest.¹

¹ During the course of the protest we received the views of the General Services Administration (GSA), the Small Business Administration (SBA), and other industry concerns.

The RFQ was posted on the FedBid website for a reverse auction for a dual cable cross machine for Fort Carson, Colorado.² RFQ at 1-2; Contracting Officer's (CO) Statement at 1. The solicitation restricted the competition to vendors holding contracts under GSA's FSS No. 7830, Recreational and Gymnastic Equipment.³ RFQ at 1. The RFQ advised offerors that the FSS contract must either be in the offeror's name or that the offeror must be able to document its ability to act as an agent on behalf of an eligible FSS vendor. See id., Instructions, at 1 (hereinafter, offeror/agent provision).

FitNet, who does not hold a FSS contract, protests that the requirement must be set aside for small businesses under the Small Business Act and contends that the Army limited the competition to FSS vendors to circumvent the Act. See Protest at 1. The protester urges that we recommend the Army cancel the RFQ and reissue the solicitation as a set-aside for small businesses. Protester's Comments at 11.

The Army, citing FitNet Purchasing Alliance, B-309911, Nov. 2, 2007, 2007 CPD ¶ 201 at 2-3, and Edmond Computer Co.; Edmond Scientific Co., B-402863, B-402864, Aug. 25, 2010, 2010 CPD ¶ 200 at 2-3, requests that we dismiss the protest, because FitNet is not an interested party to protest the procurement given that it does not hold a FSS 7830 contract. See Request for Dismissal at 3-4; Agency Report (AR) at 5-6.

We agree with the Army that FitNet is not an interested party to challenge the terms of this solicitation. As explained to FitNet in our prior decision on a nearly identical protest, because FitNet does not hold an FSS contract, it is not an interested party to challenge the agency's decision not to set aside the FSS procurement for small businesses.⁴ FitNet Purchasing Alliance, supra, at 2, recon. denied, B-309911.2, Jan. 29, 2008. Under the bid protest provisions of the Competition in Contracting

² FedBid, Inc., is a commercial online procurement services provider that runs a website at FedBid.com, which among other things, hosts reverse auctions.

³ The FSS program gives federal agencies a simplified process for obtaining commonly used commercial supplies and services. Federal Acquisition Regulation (FAR) § 8.402(a). The procedures established for the FSS program are set forth in FAR subpart 8.4 and, although streamlined, they satisfy the requirement for full and open competition. 41 U.S.C. § 152(3); FAR § 6.102(d)(3) (2010); Savantage Fin. Servs., Inc., B-292046, B-292046.2, June 11, 2003, 2003 CPD ¶ 113 at 6; Delta Int'l, Inc., B-284364.2, May 11, 2000, 2000 CPD ¶ 78 at 4.

⁴ In our prior decision, we considered GSA's and SBA's views. SBA continues to disagree with our conclusion that FitNet is not an interested party to challenge the Army's decision not to restrict the FSS procurement to small businesses.

Act of 1984, 31 U.S.C. §§ 3551-3556 (2006) (CICA), only an “interested party” may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a)(1) (2011). A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. Four Winds Servs., Inc., B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57. Given that the decision was made to procure via the FSS, FitNet, which does not hold a FSS contract, is not an interested party to protest the terms of the solicitation. FitNet, *supra*, at 2-3; *see* Edmond Computer Co.; Edmond Scientific Co., *supra*, at 2-3; *accord* K-Lak Corp. v. United States, 93 Fed. Cl. 749, 755, 756 n.7 (2010) and 98 Fed. Cl. 1, 5, 6 n.7 (2011) *citing, inter alia, FitNet*.

FitNet argues that, even though it does not hold an FSS contract, it is “eligible to participate in” the procurement under a contractor team arrangement (CTA) with another FSS vendor, and is thus is an interested party. *See* Protest at 1; Protester’s Response to GAO Interrogatory at 1. According to FitNet, an offeror need not necessarily hold its own FSS contract to bid in this FedBid reverse auction, because, as reflected in the RFQ’s offeror/agent provision, FitNet could act as an agent for an FSS vendor. Protester’s Response to Request for Dismissal at 3; RFQ at 1. FitNet contends that it has since 1995 bid on reverse auctions using arrangements with fitness manufacturers who hold FSS contracts.⁵ Protester’s Response to GSA’s Comments at 3.

GSA disagrees with FitNet’s premise that it can compete for orders under the FSS by teaming with another vendor that holds an FSS contract. Specifically, GSA states that each member in a CTA must hold its own FSS contract. *See* GSA’s Comments at 1.⁶ With respect to allowing agents to bid on behalf of an FSS vendor, GSA explains that an FSS vendor is permitted to use a consultant, or agent, during or after award, but that the offeror must submit an agent authorization letter in that regard pursuant to GSA multiple award schedule solicitation Clause SCP-FSS-001, General Proposal Submission Instructions.⁷ *See id.*, Exhib. 4;

⁵ FitNet provided, as examples of such arrangements, copies of a 2008 agency order and vendor quotation, as well as various emails between FitNet and other agency officials and vendors, which, according to FitNet, evidence that non-FSS suppliers can team with FSS vendors. *See* Protester’s Response to GAO Interrogatory at 1.

⁶ *See also* GSA FSS schedule 78, Solicitation No. 3FNG-MG-060002-B, standard clause I-FSS-40, Contractor Team Arrangements, at 58, *available at* <https://www.fbo.gov/notices/738accf41121517d91118e0a706ebc2>.

⁷ FAR § 4.102(e) provides that an agent’s authorization to bind the principal must be established by evidence satisfactory to the CO.

see, e.g., GSA Solicitation No. 3FNG-MG-060002-B, General Proposal Submission Instructions, clause SCP-FSS-001, at iv; RFQ at 1. Moreover, GSA states that FSS vendors may use dealers, but any participating dealer must be listed on the vendor's schedule price. See GSA's Comments at 1-2. Simply put, GSA states, without an FSS contract under Schedule 78, FitNet cannot be a CTA member and absent documented authorization, FitNet may not act on behalf of a Schedule 78 contract holder as an agent. Id. at 2.

In our view, the protester misconstrues, and essentially conflates, the terms agent, seller, and CTA, as those concepts apply to FAR part 8 procurements and, ultimately, to our Bid Protest Regulations under CICA. As GSA indicates, contrary to FitNet's assertion, FitNet has not shown that it is, or could be, a CTA team member.⁸ Moreover, even if FitNet could show--which it has not--that it is an authorized agent or participating dealer of a FSS vendor, FitNet would still not be an interested party under our rules because FitNet itself would merely be the offeror's agent, not the actual or prospective offeror.⁹ Although an agent may represent an interested party in a protest where it files the protest on behalf of a specified interested party and has been authorized to act for that party, see E & R, Inc., B-255868, Mar. 29, 1994, 94-1 CPD ¶ 218; Windet Hotel Corp., B-220987, Feb. 6, 1986, 86-1 CPD ¶ 138, the agent is not itself a prospective bidder or offeror and thus is not an interested party to protest on its own behalf. Priscidon Enters., Inc., B-220278, Nov. 13, 1985, 85-2 CPD ¶ 549; see also Bulloch Int'l, B-265982, Dec. 26, 1995, 96-1 CPD ¶ 5 (An authorized selling agent of a prospective offeror under a solicitation is not itself a prospective offeror and thus, where the agent files a protest of a solicitation on its own behalf, rather than on behalf of the prospective offeror, the agent is not an interested party to pursue the protest.)

Also, while FitNet contends that this requirement must be set aside for small businesses under the Small Business Act, it does not contend that, if the Small Business Act is applicable to FSS procurements, the Army could not satisfy the

⁸ We find no merit to FitNet's objections to GSA's views with regard to CTAs, see Protester's Response to GSA's comments at 5-6. Although FitNet argues that there is no regulatory requirement that each CTA member hold its own FSS contract, it is beyond cavil that orders under the FSS must be awarded only to vendors holding FSS contracts. See Brooks Range Contract Servs., Inc., B-405327, Oct. 12, 2011, 2011 CPD ¶ 216 at 4-5.

⁹ FitNet has not provided any current authorization letters or any documentation establishing that it is currently listed as a participating dealer under a FSS vendor's price schedule. Moreover, the documents submitted by FitNet to support its argument that it was member of other CTAs with FSS vendors, actually show that FitNet was acting as an agent for an FSS vendor.

Act's requirements by restricting the FSS competition to small businesses.¹⁰ In fact, in another pending protest in which FitNet challenges a decision of the Department of Veterans Affairs to not set aside an FSS procurement for small businesses (B-406329), FitNet requested as relief that the agency either conduct the FSS procurement as a small business set-aside or conduct a new procurement. See Protest (B-406329), Jan. 11, 2012, at 1.

FitNet also contends that a number of recent decisions of our Office show that FitNet is an interested party for the purpose of challenging the terms of the Army's FSS procurement here. See, e.g., Protest at 1, citing Delex Sys., Inc., B-400403, Oct. 8, 2008, 2008 CPD ¶ 181, and Aldevra, B-405271, B-405524, Oct. 21, 2011, 2011 CPD ¶ 183. Neither of these decisions indicate that FitNet is an interested party to challenge the terms of the RFQ here. In Delex, we found that the small business set-aside provisions applied to competitions for task and delivery orders under multiple-award contracts. In that case, the protester held a multiple-award contract with the procuring agency. See Delex, supra, at 2 n.3. Without such a contract, Delex too, would not have been an interested party to pursue its challenge. See, e.g., Florida State Coll. at Jacksonville, B-402656, Jun. 24, 2010, 2010 CPD ¶ 146 at 6 n.5; Outdoor Venture Corp., B-401628, Oct. 2, 2009, 2009 CPD ¶ 200 at 5 n.2. In contrast, Aldevra involved a requirement to conduct set-asides where specific conditions are met under a unique statute specific to the Department of Veterans Affairs (VA)--the Veterans Benefits, Health Care, and Information Technology Act of 2006. That Act has no application outside VA.

Finally, and for the record, neither FitNet, nor the SBA, address section 1331 of the Small Business Jobs Act of 2010 and its implementing FAR amendments. See Pub. L. No. 111-240, 124 Stat. 2504, 2541, title I, subtitle C, part III, § 1331 (Sept. 27, 2010), codified at 15 U.S.C. § 644(r). Section 1331 directed the Office of Federal Procurement Policy, in consultation with GSA, to establish guidance under which federal agencies may, at their discretion, set aside orders placed against multiple award contracts for small business concerns. See id. (emphasis added). Pursuant to the statutory mandate, the FAR Council issued an interim rule amending, among other things, FAR §§ 8.405.5, Federal Supply Schedules--Small Business; 16.505, Indefinite-Delivery Contracts--Orders, and 19.502-4,

¹⁰ The SBA in providing its views on this protest also does not address whether a procuring agency could not otherwise comply with the set-aside requirements of the Small Business Act by setting aside FSS orders for small business holding FSS contracts.

Multiple-award contracts and small business set-asides. While we reach no conclusion in this case for this protester--and without the benefit of briefs on the issue--section 1331 of the Act, as implemented by amendments to FAR §§ 8.405 5(1), 19.502-4(c), appears to address, and possibly settle, this issue.

The protest is dismissed.

Lynn H. Gibson
General Counsel