



Decision

Matter of: S. E. James & Company

File: B-415733

Date: February 7, 2018

James A. Esse, for the protester.
Karen L. Lambert, Esq., Federal Housing Finance Agency, for the agency.
Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Protest challenging actions by the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation is dismissed because these entities are not federal agencies as defined by the Federal Property and Administrative Services Act of 1949 and therefore the challenged actions are not matters within GAO's bid protest jurisdiction.

DECISION

S. E. James & Company (SEJC), of Bigfork, Montana, challenges the decisions by the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) not to include the protester on a list of approved insurance rating agencies. The protester contends that the actions by Fannie Mae and Freddie Mac are unduly restrictive of competition.

We dismiss the protest.

BACKGROUND

Congress has chartered Fannie Mae and Freddie Mac as for-profit, shareholder-owned corporations. 12 U.S.C. § 1716b-1718 and 12 U.S.C. §§ 1452-1453, respectively. These two entities share a primary mission, which is to enhance the liquidity, stability, and affordability of mortgage credit. See FEDERAL HOUSING FINANCE AGENCY: Objectives Needed for the Future of Fannie Mae and Freddie Mac After Conservatorships, GAO-17-92 at 3 (Nov. 2016). In September 2008, pursuant to its statutory authority in 12 U.S.C. § 4617, the Federal Finance Housing Agency (FHFA) placed Fannie Mae and Freddie Mac into conservatorships out of concern that their

deteriorating financial condition threatened the stability of the financial market. See id. at 1.

Fannie Mae and Freddie Mac each maintains a guide that details requirements for doing business with the entities as a seller and servicer of residential home mortgage loans. See Fannie Mae Selling Guide, <https://www.fanniemae.com/content/guide/selling/index.html> (last visited January 26, 2018); Freddie Mac Single-Family Seller/Servicer Guide, <http://www.freddiemac.com/singlefamily/guide/> (last visited January 26, 2018). These guides each contain requirements that certain loans be insured by carriers who meet minimum ratings issued by insurance ratings firms identified in the guides. See id.

SEJC states that it requested inclusion as an insurance rating firm in the Fannie Mae and Freddie Mac guides, but was rejected by each entity. Protest at 5-6. SEJC subsequently filed this protest on November 27, 2017 with our Office.

DISCUSSION

SEJC argues that the terms and criteria used by Fannie Mae and Freddie Mac for inclusion of insurance rating firms in the selling guides are unduly restrictive of competition, and thus violate the full and open competition requirements of the Competition in Contracting Act (CICA).¹ The protester argues that because Fannie Mae and Freddie Mac are under the conservatorship of FHFA, their procurement actions must therefore comply with CICA's competition requirements. Protest at 4. FHFA responded to the protest and requested dismissal on the basis that although FHFA is a federal agency for purposes of our Office's bid protest jurisdiction under CICA, Fannie Mae and Freddie Mac are not federal agencies. For the reasons discussed below, we agree with FHFA.

The jurisdiction of our Office is established by the bid protest provisions of the CICA, 31 U.S.C. §§ 3551-3556. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. Pacific Photocopy & Research Servs., B-278698, B-278698.3, Mar. 4, 1998, 98-1 CPD ¶ 69 at 4. As relevant here, CICA defines a protest to be a written objection by an interested party to a solicitation or other request by a federal agency for bids or proposals for a contract for the procurement of property or services, or an award or proposed award of such a contract. 31 U.S.C. §§ 3551(1), 3553. Our threshold jurisdictional concern is whether the procurement at issue is being conducted by a federal agency. Americable Int'l, Inc., B-251614, B-251615, Apr. 20, 1993, 93-1 CPD ¶ 336 at 2.

¹ The provisions cited by the protester are to section B-2-01 of the Fannie Mae Selling Guide, <https://www.fanniemae.com/content/guide/servicing/b/2/01.html>, and section 8202.1 of the Freddie Mac Single Family Seller/Servicer Guide, <http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/030916Guide.pdf>. Protest at 13.

CICA adopted the definition of a federal agency set forth in section 3 of the Federal Property and Administrative Services Act of 1949 (FPASA), 40 U.S.C. § 102. See 31 U.S.C. § 3551(3). FPASA defines a federal agency as “an executive agency or an establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol, and any activities under the direction of the Architect of the Capitol).” 40 U.S.C. § 102(5). An executive agency is “an executive department or independent establishment in the executive branch of the Government,” or “a wholly owned Government corporation.” Id. § 102(4). Fannie Mae and Freddie Mac are for-profit, shareholder-owned corporations. 12 U.S.C. § 1716b-1718 and 12 U.S.C. §§ 1452-1453, respectively. Based on these statutory provisions, we conclude that Fannie Mae and Freddie Mac are not executive agencies,² nor are they wholly owned government corporations.³

SEJC nonetheless argues that because FHFA placed Fannie Mae and Freddie Mac into conservatorships, pursuant to the authority of 12 U.S.C. § 4617, these entities should be deemed to be federal agencies by virtue of FHFA’s control over them. Protest at 4; Protester’s Response to Agency Request for Dismissal, Dec. 7, 2017, at 1-2. In this regard, the protester notes that, under 12 U.S.C. § 4617(b)(2)(A)(i), FHFA “succeeded” to all rights, titles, powers, and privileges of the regulated entity. Protester’s Response to Agency Request for Dismissal, Dec. 7, 2017, at 1.

Nothing in 12 U.S.C. § 4617, however, defines Fannie Mae or Freddie Mac as federal agencies under FPASA. Similarly, nothing in 12 U.S.C. § 4617 states that Fannie Mae or Freddie Mac must comply with the competition requirements of CICA. In light of the fact that Fannie Mae’s and Freddie Mac’s status remains as non-federal agencies for purposes of FPASA, we conclude that the fact that FHFA has the statutory responsibility

² For example, 5 U.S.C. § 101 sets forth those entities deemed executive departments and does not include Fannie Mae or Freddie Mac. Additionally, unlike other entities created by statute as an “independent establishment in the executive branch of the Government,” e.g., the U.S. Postal Service, 39 U.S.C. § 201, neither Fannie Mae nor Freddie Mac is defined by statute as such an independent establishment, 12 U.S.C. §§ 1452, 1717, 1718. Rather, each entity is designated by statute as a “body corporate” under the direction of a board of directors elected by shareholders. Id.

³ Section 9101 of title 31 of the United States Code defines a government corporation to include either a mixed-ownership Government corporation or a wholly owned corporation. 31 U.S.C. § 9101(1). That statute defines a wholly owned government corporation as one of the entities listed in 31 U.S.C. § 9101(3). Neither Fannie Mae nor Freddie Mac are listed in 31 U.S.C. § 9101(3) as a wholly owned government corporation.

as conservator to regulate and supervise these entities does not mean that the entities are federal agencies within our bid protest jurisdiction under CICA.⁴

The protest is dismissed.

Thomas H. Armstrong
General Counsel

⁴ SEJC raises other arguments in support of its contention that our Office has jurisdiction. Although we do not discuss every argument, we have reviewed them all and find no basis to conclude that we have jurisdiction over the actions challenged by the protester. FHFA also argues that the actions challenged here by the protester do not concern the procurement of goods or services to be provided to the government, and are therefore not within our Office's bid protest jurisdiction under CICA. See 31 U.S.C. § 3551(1)(A). Because we conclude that the protest concerns actions by entities that are not federal agencies, we need not resolve this question. For the record, however, the protester acknowledges that the disputed actions do not concern the provision of goods or services to Fannie Mae or Freddie Mac, but rather inclusion in a guide that sets forth standards for insurance carriers from whom private entities purchase insurance. See Protester's Response to Agency Request for Dismissal, Dec. 7, 2017, at 3.