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U.S. Small Business Administration



Your Small Business Resource

To: Raul Espinosa

Organization: FitNet Purchasing Alliance

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Date: 9/4/2007 Time: ~~1:00 PM~~

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No. of pages (including this cover sheet) 11

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Message:

Protest of FitNet Purchasing Alliance, B-309911

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U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20418

September 4, 2007

Via Facsimile

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RE: Response to Agency Report in B-309911, Protest of FitNet Purchasing Alliance

Dear Mr. Wengert:

On July 26, 2007, FitNet Purchasing (FitNet) filed a 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). According to the protest, the contracting officer's (CO's) decision not to reserve the solicitation for small business concerns (SBCs) was not reasonable and was contrary to the Small Business Act. For the reasons set forth below, we agree with the protester and believe the protest should be sustained.

FACTS

On July 23, 2007, the Army issued Solicitation No. SWCSKQ-7177-N035 on FedBid.com for the delivery of fifty wardrobe lockers to Fort Bragg. The Army utilized the reverse auction feature associated with FedBid.com. The solicitation had a target price of \$12,500.00 and stated that only GSA Schedule holders could submit offers. The Army did not set aside the solicitation for small businesses. This protest to the GAO ensued.

The Army has requested that the GAO dismiss this protest because it believes that small business set asides and the small business programs set forth in 13 C.F.R. parts 124, 125 and 126 and Federal Acquisition Regulations (FAR) Part 19 do not apply when a procuring agency utilizes the GSA Schedule program. The Army believes that the GAO has previously ruled on this same issue in Global Analytic Info. Tech. Servs., Inc., B-297200.3, March 21, 2006, 2006 CPD ¶ 53.¹ The GAO has requested that the U.S. Small Business Administration (SBA) and U.S. General Services Administration (GSA) respond to these issues.

¹ We note that the estimated value of the acquisition in Global Analytics, supra, was above the simplified acquisition threshold.

ANALYSIS

1. Acquisitions Valued from \$3,000 to \$100,000 (\$250,000 in limited cases) and Mandatory Set Asides for Small Businesses

The SBA believes that the Army was required to set aside this acquisition for small businesses as required by the Small Business Act, 15 U.S.C. § 644(j). The FAR regulations support this position. 48 C.F.R. § 19.502-2(a). In addition, the FAR explains that such a small business set aside takes a priority over the GSA Schedule program. Specifically, the FAR sets forth a list of required sources for supplies and services that procuring agencies must consider when acquiring goods and services. According to FAR § 8.002:

(a) Except as required by 8.003, or as otherwise provided by law, agencies shall satisfy requirements for supplies and services from or through the sources and publications listed below in descending order of priority –

(1) Supplies.

(i) Agency inventories;

(ii) Excess from other agencies (see Subpart 8.1);

(iii) Federal Prison Industries, Inc. (see Subpart 8.6);

(iv) Supplies which are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (see Subpart 8.7);

(v) Wholesale supply sources, such as stock programs of the General Services Administration (GSA) (see 41 CFR 101-26.3), the Defense Logistics Agency (see 41 CFR 101-26.6), the Department of Veterans Affairs (see 41 CFR 101-26.704), and military inventory control points;

(vi) Mandatory Federal Supply Schedules (see Subpart 8.4);

(vii) Optional use Federal Supply Schedules (see Subpart 8.4); and

(viii) Commercial sources (including educational and nonprofit institutions).

(2) Services.

(i) Services which are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (see Subpart 8.7);

(ii) Mandatory Federal Supply Schedules (see Subpart 8.4);

(iii) Optional use Federal Supply Schedules (see Subpart 8.4); and

(iv) Federal Prison Industries, Inc. (see Subpart 8.6), or commercial sources (including educational and nonprofit institutions).

(b) Sources other than those listed in paragraph (a) of this section may be used as prescribed in 41 CFR 101-26.301 and in an unusual and compelling urgency as prescribed in 6.302-2 and in 41 CFR 101-25.101-5.

(c) The statutory obligation for Government agencies to satisfy their requirements for supplies or services available from the Committee for Purchase From People Who Are Blind or Severely Disabled also applies when contractors purchase the supplies or services for Government use.

(Emphasis added).² According to the plain meaning of the regulation, procuring agencies are required to follow the ordering priority set forth in FAR § 8.002, unless FAR § 8.003 or another law requires otherwise. According to the history of the regulation:

PART 8--REQUIRED SOURCES OF SUPPLIES AND SERVICES

The introduction to part 8 is presented in §§ 8.000, 8.001, and 8.002. The coverage, based on the Federal Property Management Regulation (FPMR) 101-26.107, specifies priorities established in the FPMR for the use of Government supply sources. It is intended to assist contracting officers, so they will not inadvertently contract for items that are available from required Government sources.

46 Fed. Reg. 32600 (June 24, 1981) (request for review and comment on draft FAR) (emphasis added). The history of § 8.002 explains that supplies and services should first come from required Government sources, and then the Government should look at other sources, such as supply schedules and commercial sources. It is not clear how and why the regulation would appear to require the use of schedules before commercial sources, including small business sources.

The GAO has already addressed the acquisition “priority” set forth in the FAR, in part. In the protest of Murray-Benjamin Electric Company, LP, B-298481, 2006 CPD ¶ 129, Sept. 7, 2006, the protester argued that the procuring agency was required to utilize a nonmandatory Federal Supply Schedule (FSS) contract for its acquisition of services, rather than acquire the services using full and open competition. The GAO disagreed and stated:

[The protester’s] assertions are without merit. Under a mandatory FSS contract, an agency generally must order its requirements under that FSS if its minimum needs will be met by the products or services listed in the schedule. Adams Magnetic Prods., Inc., B-256041, May 3, 1994, 94-1 CPD ¶ 293 at 3. However, as conceded by [the protester] its FSS contract is not mandatory; thus, an agency’s use of that contract is voluntary. There is nothing else in the FAR, or elsewhere, that compelled the agency here to meet its requirements under MBE’s FSS contract. FAR § 8.404 simply provides guidance on the use of the FSS – e.g., restricting competition to the FSS and eliminating the need for additional determinations of fair and reasonable pricing; it does not require agencies to use the FSS. Similarly, while the list of required sources found in FAR § 8.002 places non-mandatory FSS contracts above commercial sources in priority, it does not require an agency to order from the FSS. Further, although an agency’s placement of an FSS order indicates that the agency has concluded that the order represents the best value (FAR § 8.404(d)), the regulation does not establish a

²FAR § 8.003 requires agencies to satisfy requirements for the following supplies or services from or through specified sources, as applicable: (a) public utility services (see Part 41); (b) printing and related supplies (see Subpart 8.8); (c) leased motor vehicles (see Subpart 8.11); (d) strategic and critical materials from inventories exceeding Defense National Stockpile requirements; and (e) helium (see Subpart 8.5).

presumption that all FSS contractors represent the best value, such that the agency would be required to purchase from an FSS vendor.

Murray-Benjamin Electric Co., LP, *supra* (emphasis added). In the protest, the GAO had requested GSA's opinions about the issue. GSA confirmed to the GAO that, absent a statute or regulation explicitly providing that use of a particular FSS contract is mandatory, an agency's use of that contract is voluntary. *Id.* at fn. 4. Further, GSA explained that it encourages agencies to use its nonmandatory schedules; however, if an agency determines that it is in its best interests to meet its needs elsewhere, it is free to do so. *Id.* at fn. 5. Thus, nonmandatory FSS contracts do not take priority over commercial sources.

The GAO has also ruled, twice, on the use of FSS contracts versus small business set asides, for acquisitions exceeding \$100,000. In both protests, the protesters argued that the procuring agency was required to set aside the acquisition for small businesses rather than obtain the services via a FSS contract. Information Ventures, Inc., B-291952, 2003 CPD ¶ 101, May 14, 2003; Future Solutions, Inc., B-293194, 2004 CPD ¶ 39, Feb. 11, 2004. In both protests, the GAO stated that the argument was without merit. *Id.* The GAO specifically stated that "no statute or regulation required the agency to set aside this requirement for small businesses in lieu of purchasing from FSS vendors." Future Solutions, Inc., *supra*. Therefore, a procuring agency can, for acquisitions valued above \$100,000, use either a small business set aside or a FSS contract (or both) to meet its need (assuming other sources have first been considered and rejected).

We believe those GAO rulings were premised on the fact that small business set asides are not mandated specifically by statute for acquisitions valued above \$100,000. However, the Small Business Act does state the following with respect to proposed acquisitions valued below \$100,000:

(j) Small business reservation

(1) Each contract for the purchase of goods and services that has an anticipated value greater than \$2,500 but not greater than \$100,000³ shall be reserved

³ The Small Business Act states that small business set asides are mandatory for the acquisition of supplies and services valued from \$2,500 to \$100,000. 15 U.S.C. § 644(j)(1). However, 41 U.S.C. § 431a(a)(1) states that the "Federal Acquisition Regulatory [FAR] Council shall adjust each acquisition-related dollar threshold provided by law, as described in subsection (c) of this section, to the baseline constant dollar value of that threshold." The FAR Council published a rule proposing such adjustments on December 12, 2005 (70 Fed. Reg. 73415) and published a final rule on September 28, 2006, which implemented these inflationary adjustments. 71 Fed. Reg. 57363. As a result of 41 U.S.C. § 431a and the final rule, the FAR now states:

(a) Each acquisition of supplies or services that has an anticipated dollar value exceeding \$3,000 (\$15,000 for acquisitions as described in 13.201(g)(1)), but not over \$100,000, (\$250,000 for acquisitions described in paragraph (1) of the Simplified Acquisition Threshold definition at 2.101), is automatically reserved exclusively for small business concerns and shall be set aside for small business unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery.

48 C.F.R. § 19.502-2. The FAR rule also addresses different thresholds for certain emergency acquisitions.

exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the goods or services being purchased.

(2) In carrying out paragraph (1), a contracting officer shall consider a responsive offer timely received from an eligible small business offeror.

(3) Nothing in paragraph (1) shall be construed as precluding an award of a contract with a value not greater than \$100,000 under the authority of subsection (a) of section 637 of this title, section 2323 of Title 10, section 712 of the Business Opportunity Development Reform Act of 1988 (Public Law 100-656; 15 U.S.C. 644 note), or section 7102 of the Federal Acquisition Streamlining Act of 1994.

15 U.S.C. § 644 (emphasis added); see also 48 C.F.R. 19.502-2(a) (FAR requirement on small business set asides). This statutory provision creates a mandatory small business reservation for acquisitions valued below \$100,000, if certain conditions are met. There is nothing in statute or GAO rulings indicating that a GSA Schedule contract should or can take priority over this statutorily mandated small business reservation requirement. Therefore, in accordance with FAR § 8.002(a), “as otherwise provided by law” – 15 U.S.C. § 644(j) -- small business set asides take a priority over GSA Schedule contracts for acquisitions valued from \$3,000 to \$100,000.⁴ See 48 C.F.R. § 8.002(a).

In sum, according to statute and regulations, small business set asides are mandatory for acquisitions valued from \$3,000 to \$100,000 and take priority over GSA Schedule contracts. This interpretation is consistent with the declared and unambiguous intent of Congress as it relates to Federal procurement and small businesses. See 15 U.S.C. § 631(a) (“It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to ensure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small business enterprises”); 15 U.S.C. § 644(a) (“To effectuate the purposes of this Act, small business concerns within the meaning of this Act shall receive any award or contract or any part thereof...as to which it is determined by

⁴ Although set asides are mandatory for acquisitions that exceed \$3,000 but are less than \$100,000 (\$250,000 in limited cases), the Act, SBA’s regulations and FAR permit, but do not require, the reservation of an award of a contract with a value less than the simplified acquisition threshold to different types of small businesses such as 8(a), HUBZone or SDVO SBCs. See 15 U.S.C. § 644(j)(3), 13 C.F.R. §§ 125.21, 126.608, and 126.612, and Lamar International, Inc., B-297231, Oct. 19, 2005.

In addition, although not an issue in this protest, we believe that the “notwithstanding any other provision of law” language set forth in § 31 of the Small Business Act (and relates to HUBZone sole source and set aside awards) clearly requires the disregard of certain laws outside of the Small Business Act. This means that “notwithstanding any other provision of law,” including law relating to GSA Schedule contracts, a contracting officer shall set aside an acquisition for HUBZone small businesses if certain conditions are met. Therefore, we also believe that HUBZone small business set asides take a priority over GSA Schedule contracts for acquisitions valued above the simplified acquisition threshold.

the Administration and contracting procurement or disposal agency ... (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government in each industry category are placed with small-business concerns"). Consequently, before considering the GSA Schedule for this purchase of wardrobes, valued less than \$100,000, the Army was required, but failed to, determine whether the acquisition must be set aside for small businesses.

2. GSA Schedules and Small Business Programs

The GAO has stated in numerous rulings that FAR § 8.404(a)(1) exempts the application of FAR part 19, concerning SBA's small business programs, from blanket purchase agreements (BPAs) or orders placed against GSA's Schedule contracts. See Global Analytic, supra; Millennium Data Systems, Inc., B-292357.2, March 12, 2004, 2004 CPD ¶ 48. The Army believes that these rulings exempt it from setting aside the requirement at issue here for small businesses. As discussed in the previous section of this submission, we disagree. We believe that **small business set asides are mandatory for acquisitions valued from \$3,000 to \$100,000 and take priority over GSA Schedule contracts.** We also believe, however, that while the Army should have set aside or reserved the acquisition of the wardrobes for small businesses, it nonetheless could have still used the GSA Schedule.

The FAR does not preclude an agency from using FAR Part 19 procedures when also using the GSA Schedule. In fact, FAR § 8.405-5 states:

- (b) Ordering activities may consider socio-economic status when identifying contractor(s) for consideration or competition for award of an order or BPA. At a minimum, ordering activities should consider, if available, at least one small business, veteran-owned small business, service disabled veteran-owned small business, HUBZone small business, women-owned small business, or small disadvantaged business schedule contractor(s). GSA Advantage! and Schedules e-Library at <http://www.gsa.gov/fss> contain information on the small business representations of Schedule contractors.
- (c) For orders exceeding the micro-purchase threshold, ordering activities should give preference to the items of small business concerns when two or more items at the same delivered price will satisfy the requirement.

According to the preamble to the final rule amending this regulation, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) received comments concerning small businesses and GSA Schedules. The Councils rejected recommendations to require agencies to conduct a small business set-aside analysis before placing an order, or to require that all orders between \$2,500 and \$100,000 be restricted to SBCs.⁵ However, the Councils stated:

The Councils added language at FAR 8.405-5(b) that provides that 'Ordering activities may consider socio-economic status when identifying contractor(s) for consideration or competition for award of an order or BPA.'⁷ This language

⁵ As noted above, we disagree with the Councils' position and believe that it is contrary to statute.

provides the flexibility for agencies to conduct their market research focusing on small business concerns and providing them greater opportunity to compete for orders.

69 Fed. Reg. 34231, 34232 (2004). Thus, the FAR does not explicitly prohibit (nor could it legally) an ordering agency from limiting competition for a GSA Schedule order to small businesses, nor did the Councils indicate an intent to do so when they amended FAR subpart 8.4. Moreover, GSA Acquisition Letter V-05-12 (which has recently expired) did not explicitly prohibit an agency from limiting an order competition to small businesses. Rather, GSA Acquisition Letter V-05-12 simply established procedures for ordering agencies to use socio-economic status as an evaluation factor in GSA Schedule order competitions.

Further, in CMS Information Services, Inc., B-290541, Aug. 7, 2002, 2002 CPD ¶ 132, the GAO held that an ordering agency may require vendors to submit size certifications in connection with a competition for a GSA Schedule order limited to small businesses. GAO noted that the supplemental ordering instructions applicable to the relevant schedule provided: "When buying IT professional services under SIN 132-51 ONLY, the ordering office, at its discretion, may limit consideration to those schedule contractors that are small business concerns." CMS Information Services, Inc., B-290541, Aug. 7, 2002, 2002 CPD ¶ 132, n.1 quoting GSA FSS Contract No. FCIS-JB-980001B at 115-16. Ordering agencies have been "setting aside," "reserving" or otherwise limiting competition for orders (or BPAs) to small businesses under GSA's Schedule program for many years. See Client Network Services, Inc. v. U.S., 64 Fed. Cl. 784 (Fed. Cl. 2005); Systems Plus, Inc., B-297215.4, Dec. 16, 2005, 2005 WL 3671840 (Comp. Gen.); Planned Systems International, Inc., B-292319.7, Feb. 24, 2004, 2004 CPD ¶ 43; CMS Information Services, Inc. - Reconsideration, B-290541.2, Nov. 13, 2002; Size Appeal of Client Network Services, Inc., SBA No. SIZ-4686 (2005); Size Appeal of the MIL Corporation, SBA No. SIZ-4641 (2004); Size Appeal of Advanced Management Technology, Inc., SBA No. SIZ-4638 (2004); Size Appeals of Vistronix, Inc. and Department of Justice, SBA No. SIZ-4585 (2003); Size Appeal of Vistronix, Inc., SBA No. SIZ-4550 (2003); Size Appeal of Jason Associates, Inc., SBA No. SIZ-4489 (2002); NAICS Appeal of SCI Consulting, Inc., SBA No. NAICS-4488 (2002); Size Appeal of Advanced Technologies and Laboratories International, Inc., SBA No. SIZ-4484 (2002); Size Appeals of SETA Corporation and Federal Emergency Management Agency, SBA No. SIZ-4477 (2002).

The SBA believes that any regulation or ruling precluding small business set asides or "reserves" off of the GSA Schedule would be contrary to law. The Small Business Act is replete with references and mandates on Federal procurement awards to small businesses. The statute "creating" the GSA Schedule program merely states as follows:

- (3) the procedures established by the Administrator for the multiple awards schedule program of the General Services Administration [is a competitive procedure] if --
 - (A) participation in the program has been open to all responsible sources; and
 - (B) orders and contracts under such procedures result in the lowest overall cost alternative to meet the needs of the Government.

41 U.S.C. § 259(b). This statute does not exempt GSA Schedule awards or orders issued pursuant to the Schedule contract from the Small Business Act. It merely establishes GSA Schedule awards as competitive procedures. Nothing in the legislative history exempts the GSA Schedule contracts or orders from the Small Business Act, either.

In fact, prior to 1995, the regulations implementing GSA Schedule contracts and orders, found at FAR Part 38, provided that: "Small Business set-aside programs apply to both single and multiple-award schedule contracting (see Part 19)." 48 C.F.R. § 38.203(b) (1994). This regulatory provision was deleted in 1994, apparently as a result of the Federal Acquisition Streamlining Act (FASA). The final rule deleting this provision stated:

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on a final rule to amend the Federal Acquisition Regulation (FAR) concerning Federal Supply Schedules and Federal Supply Schedule contracting. These changes are a result of GSA's efforts to streamline and revise the Multiple Award Schedule Program's ordering procedures to be guiding principles. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

59 Fed. Reg. 53716 (Oct. 25, 1994). The final rule further stated that:

The efforts to streamline and revise Multiple Award Schedule ordering procedures in order to make them more susceptible to guiding principles will save the Government time, money, and improve the accessibility of commercial items to customers. With these changes, GSA will be able to foster a Government that works better and costs less.

Id. Again, it appears that the FAR exempted the small business programs from GSA Schedule contracts and orders as a result of FASA and FASA's effort to streamline Government contracting. There is nothing in FASA, however, or its legislative history to support this change. For example, one Senate Report concerning FASA stated the following:

The committee [on Armed Services] has approached the [FASA] legislation with the view that it must be implemented in a manner that makes the broadest use of the skills and resources of all segments of the business community, including small and small disadvantaged businesses. While the implementation of acquisition reform requires a substantial amount of flexibility, the committee notes that there may be a temptation on the part of both those who write regulations and those who manage programs to use that flexibility in a manner that simply relies on large, established businesses to supply goods and services. Such an approach would be shortsighted, because it would deprive the government of the advantages that accrue from stimulating and developing a large number of sources, as well as the innovation and creativity that resides in America's small businesses. The committee will work closely with the Committee on Small Business, as well as the Committee on Governmental

Affairs, in the oversight of the legislation to ensure that it is implemented in a manner that enhances the ability of small disadvantaged businesses to participate in the federal acquisition process.

S. Rep. No. 103-259, at 6 (1994), reprinted in 1994 U.S.C.C.A.N. 2598, 2603. It was not the intention of the Senate Committee on Armed Services for FASA to hinder or exclude small business participation in GSA Schedule contracting. Thus, the small business programs were not intended to be affected by FASA and thus should still apply to GSA Schedules. As it stands now, agencies believe that the Small Business Act's programs do not apply to either the GSA Schedule contracts or orders issued off of the contracts. This is clearly contrary to statute and Congressional intent.

In order to harmonize the provisions of the Small Business Act with the GSA Schedule Program, we believe that the Army was required to reserve this solicitation for small businesses, but could have done so using the GSA Schedule. Section 259(b) of Title 41 provides that "competitive procedures" means procedures under which an executive agency enters into a contract pursuant to full and open competition" and includes:

- (3) the procedures established by the Administrator for the multiple awards schedule program of the General Services Administration if--
 - (A) participation in the program has been open to all responsible sources; and
 - (B) orders and contracts under such procedures result in the lowest overall cost alternative to meet the needs of the Government;
- (4) procurements conducted in furtherance of section 644 of Title 15 as long as all responsible business concerns that are entitled to submit offers for such procurements are permitted to compete; and

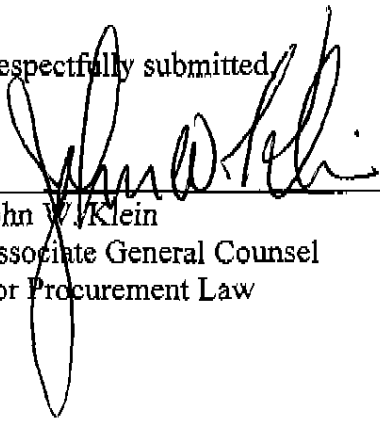
If the Army set aside or reserved the acquisition of the wardrobes for small businesses, and used the GSA Schedule, it would have met the requirements for competition, as set forth above (participation in the Schedule program – the underlying GSA Schedule contract -- was open to all sources, any orders awarded to small businesses would have resulted in the lowest overall cost, and the procurement was conducted in furtherance of 15 U.S.C. § 644).⁶ In addition, it would be similar to the issuance of BPAs off of GSA Schedule contracts. 48 C.F.R. § 8.405-3, FAR § 8.405-3 allows agencies to limit competition off the GSA Schedule by selecting one or more schedule contractors for future orders through the use of a competitively awarded BPA. If agencies can limit competition off of a GSA Schedule with a BPA (with no statutory authority for doing so), surely they can limit competition for small businesses, as specifically authorized by the Small Business Act.

⁶ We note that Section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107-107) (which applies to the acquisition of services and not supplies), as implemented in DFARS § 208.405-70, applies to purchases above \$100,000. Therefore, that DFARS provision is not applicable here.


CONCLUSION

For the foregoing reasons, we believe that the Army was required to set aside the requirement for small businesses and the protest should be sustained. Thank you for this opportunity to respond.

Respectfully submitted,



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