



Decision

Matter of: Edmond Computer Company; Edmond Scientific Company

File: B-402863; B-402864

Date: August 25, 2010

Ron R. Hutchinson, Esq., and James D. Bachman, Esq., Doyle & Bachman LLP, for the protesters.

Timothy J. Haight, Esq., Department of Veterans Affairs; Michael D. Tully, Esq., General Services Administration; and Kenneth Dodds, Esq., Small Business Administration, for the agencies.

Paula A. Williams, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The set-aside provisions of Federal Acquisition Regulation (FAR) part 19 do not apply to competitions among Federal Supply Schedule vendors using FAR part 8 procedures.

DECISION

Edmond Computer Company and Edmond Scientific Company protest the terms of request for quotations (RFQ) No. 701-10-RQ-0104, issued by the Department of Veterans Affairs (VA) to vendors holding General Services Administration (GSA) Federal Supply Schedule (FSS) contracts under Group 70, Information Technology Equipment, Software and Services. Edmond Computer, a firm that is both a service-disabled veteran-owned small business (SDVOSB) and an FSS holder, and Edmond Scientific,¹ a firm that is both a veteran-owned small business (VOSB) and an FSS holder, each allege that the competition should be limited to small business participation and conducted outside of the FSS program.

We deny the protests.

¹ Edmond Scientific was the incumbent contractor for this requirement from September 2007 through May 2009.

The VA originally sought quotations for a contractor to operate the Emerging Health Technologies Advancement Center from FSS vendors using Federal Acquisition Regulation (FAR) part 8 procedures (RFQ No. 776-09-0311). This led to a protest to our Office from Edmond Scientific, and the VA took corrective action in response to that protest. The agency subsequently issued a revised solicitation (RFQ No. 776-09-RQ-0229) utilizing SDVOSB set-aside procedures, and it later cancelled that solicitation. The RFQ protested here was issued on May 7, 2010, pursuant to FAR part 8 procedures, and contemplates the issuance of a single blanket purchase agreement (BPA) against the successful vendor's FSS contract.² The solicitation is not set aside for small businesses, SDVOSBs, or VOSBs.

The protesters contend that the decision to conduct this competition among FSS vendors using FAR part 8 procedures violates the small business set-aside requirements of the Small Business Act, 15 U.S.C. § 644(a), as implemented by FAR § 19.502-2(b). The cited FAR provision implements the Act by generally requiring an agency to set aside acquisitions with an anticipated dollar value of more than \$100,000, such as the one here, for small businesses where there is a reasonable expectation of receiving fair market prices from at least two small business concerns (the so-called "Rule of Two"). The protesters contend that the agency is required to evaluate whether the Rule of Two is satisfied (and if so, set aside the solicitation for small businesses) before purchasing needed goods or services through the FSS program.³ Protest at 5-8; Comments at 9-10.

The regulations implementing the Small Business Act and GSA's FSS Program expressly anticipate and exclude FSS buys from set-aside requirements. FAR §§ 8.404(a), 19.502-1(b), 38.101(e); Future Solutions, Inc., B-293194, Feb. 11, 2001, 2004 CPD ¶ 39 at 3. In this regard, FAR § 8.404(a) and § 38.101--both of which pertain to FSS contracting--provide that FAR part 19, pertaining to small business programs, do not apply to BPAs or orders placed against FSS contracts. Similarly,

² The FSS program gives federal agencies a simplified process for obtaining commonly used commercial supplies and services. 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. § 259(b)(3) (2006); 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.

³ We solicited the views of both the GSA, which administers the FSS program, and the Small Business Administration (SBA). Although GSA agrees with our analysis, the SBA argues that small business programs take precedence over the FSS program.

FAR § 19.502-1(b), which implements small business requirements, also confirms that set-aside provisions do not apply to FSS buys.⁴

Despite the clear language of these FAR provisions, the protesters argue that the provisions are inapplicable here. Specifically, the protesters rely on introductory provisions in FAR § 8.002(a), which state that “except as . . . otherwise provided by law, agencies shall satisfy requirements for supplies and services from” FSS vendors (among other sources). In their view, the Small Business Act, as implemented through the set-aside requirements of FAR § 19.502-2(b)—i.e., the Rule of Two—is “otherwise provided by law” and takes precedence over FSS purchases. Comments at 11; Supplemental Comments at 4-5. We find these arguments unpersuasive.

Nothing in the Small Business Act suggests or requires that the Rule of Two—which is set forth in the regulations that implement that Act (but is not found in the Act itself), see Delex Sys., Inc., B-400403, Oct. 8, 2008, 2008 CPD ¶ 181 at 6-7—takes precedence over the FSS program. To the contrary, and as noted above, the implementing regulations for the small business set-aside program and the FSS program expressly provide that set-aside requirements for the program do not apply to FSS buys. See FAR §§ 8.404(a), 19.502-1(b), 38.101(e). Accordingly, we conclude that the Small Business Act and its implementing regulations do not impose a requirement on agencies to first evaluate whether a solicitation should be set-aside for small businesses before purchasing the goods or services through the FSS program.⁵

The protests are denied.

Lynn H. Gibson
Acting General Counsel

⁴ We find the protesters’ attempt to distinguish between mandatory and optional FSS buys, and their further argument that the FAR exclusion of set-aside requirements applies only to mandatory FSS buys, to be unconvincing.

⁵ In their comments, for the first time, the protesters assert that the agency’s decision not to set-aside the procurement for SDVOSBs or VOSBs violates the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. § 8127(d) and § 8128(a), as implemented by VA FAR Supplement § 819.7005(a), which contains a requirement to set aside VA procurements for SDVOSBs or VOSBs where the Rule of Two has been met. However, this argument is untimely raised. See Cedar Electric, Inc., B-402284.2, Mar. 19, 2010, 2010 CPD ¶ 79 at 4 (protest issues apparent at the outset of a protest, but raised for the first time in comments, are untimely).