
Contracting ABUSE by the US Air Force

A Special Report on procurement abuse.

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October 26th, 2005

FACTS

- OHA has confirmed Air Force contracting abuse when it said in one of its rulings, *"The Air Force actions are negligent at best, at worst, deliberate attempts to mislead SBA and this Office."*
- Although the SBA has found Precor, Inc., a large company, to be affiliated – in violation of the FAR - with The Corps Group, Inc., for the purpose of bidding/receiving 'set-asides contracts, **the Air Force has continued to unethically favored Precor, Inc. on set-aside contracts, through other means.**
- Government contracting abuse - according to a Congressional Report - is costing small businesses **\$9 Billion yearly!**
- According to the same Congressional Report, the Government failure to meets its own small business goals, is costing small businesses **\$13.8 billion in lost contracting opportunities.**
- Legal costs, to among other things fight this abuse, is also costing small businesses - according to the U.S. Chamber of Commerce - **\$88 Billion per year!**

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Overview

The FitNet Purchasing Alliance was formed in 1995, in part, to serve the needs of military facilities and organizations as they implement programs to improve the health and wellness of their personnel or other participants. In many arenas, we have been quite successful in providing equipment or technology to these target markets. In the past three years, however, we have experienced a pattern of losses in bids to the Air Force that are so unusual and so pronounced that they rise to the level of abuse. We use this term with considerable reservation: it is entirely expected that there will be wins and losses in any competitive arena.

The evidence that leads us to this conclusion arises from the pattern of behavior exhibited by the contracting organizations in support of their end-users and the explanations we have received regarding the reasons for losing a contract. When an award is explicitly given to another vendor because our product is of a "higher quality" than a more costly product from the winning vendor and will thus not meet the expectations and previous experiences of the Air Force personnel using the product, it is hard to avoid concluding that something is seriously awry in the procurement process. In the remainder of this (short) piece, we would like to present our case regarding the abuses we feel we have suffered. In particular, we will focus on the fact that the pattern that we have observed always includes a preference for larger vendors, unethical interference from end-users and an unwillingness to work with small and minority or women-owned businesses.

A Summary of Alleged Air Force Procurement Abuses

Over the course of the past three years, we have experienced significant procedural problems in fourteen distinct attempts to serve the Air Force:

- We suffered disputes with Malmstrom AFB, Seymour Johnson AFB and Nellis AFB regarding solicitations for health/fitness related products. In the case of Nellis AFB, we eventually settled our dispute, but it required us to fight every step of the way to protect our rights to an award we had won in open competition. In the other two cases, we were given assurances that the problem was recognized and that, if we would only withdraw our protests, we would be offered future contract considerations via a contracting venue approved by the AF. These assurances, however, have not been honored. We have waited more than 24 months for a resolution with Malmstrom AFB and about 16 months with the Seymour Johnson AFB.

While potential contracts were discussed with the two bases, it appears as if the effort was only 'lip-service.' The two bases, subsequently, withdrew our offers from discussions citing, among other things, that we were not 'fair and reasonable' when in fact our offers were both for well under 10 % over the GSA price. (i.e., one was 5 %!) In the case of Malmstrom AFB, they actually allowed their end-user to prevent FitNet from winning a bid (Set-aside Sol # FE462650060067) with a lowest price, best value offer by canceling the solicitation and re-bidding it. What did happen was that the end user was allowed to insert a new and meaningless feature – which only their favored vendor was able to offer – to keep FitNet out of the competition.

- In a "set aside" solicitation with Wright-Patterson AFB (Sol # FA8601-04-R-0039), FitNet was the only vendor to submit a qualified bid (one that met the requirements stated in the solicitation). Rather than awarding us the contract, the Air Force ignored our bid and instead awarded the contract to another vendor who had not bid on the solicitation, but who was on the Federal Schedule. In pursuing this course, Wright-Patterson did not even bother to cancel the original solicitation or inform the bidders. Furthermore, when we confronted their mistake, we secured proof that they had tried to cover-up their mistake. Eventually, they had to cancel the solicitation! We have battled, again, with Wright-Patterson (Set Aside Sol # FA8604-05-R-0177) over their end-user's efforts to manipulate the requirements and keep FitNet from competing on the solicitation. We succeeded in eliminating a sole source request, but the end-user changed the specifications by demanding accessories which were not in the original specifications which only the preferred vendor could supply. These accessories were 'useless' since they are no longer required by the Air Force fitness protocols. We have alleged that the purchase violated the 'waste-fraud-abuse' regulations by causing the government to pay for products they do not need.
- The Air Force Reserve Command Niagara Falls (IAP-ARS) ignored the bids received on a set aside solicitation (Set Aside Sol # FA6670-04-T-0026) in which we were participants, and made the same purchases, also without canceling the solicitation or advising us, from large companies off the Federal Schedule. When confronted about these decisions, the procurement officer simply claimed that the vendors were small businesses. Note that this case was also unusual in that the initial cancellation of the solicitation occurred without SBA PCR knowledge and without a valid reason being given. Additionally, the Agency has failed to respond to a FOIA request for the bid tabulation on the cancelled set aside. It was filed in excess of thirty months ago!

- Lackland AFB indicated that it would award FitNet with a contract for goods under the small-business set aside program. However, Lackland then proceeded to challenge FitNet's small-business status and to rescind the offer. When FitNet had the challenge dismissed (we are, indeed, a small business under any prevailing standard), Lackland AFB simply cancelled the entire solicitation (Set Aside Sol # 03TC474).
- Procurement personnel at Little Rock AFB awarded contracts to large companies (those not qualifying for small-business status) on two set aside solicitations (Set Aside Sol #s F13SVS222401 and F13SVS222402). When FitNet challenged the propriety and even legality of these awards, we were offered promises of future awards if we would only drop our protests. In both cases, no attempt to fulfill these promises has been forthcoming. Despite the fact that we have dropped our protest, we have reason to believe that the AF reported the purchases as being made from small businesses when, in fact, they were not.
- Beale AFB ignored a timely bid, filed via email, on a set-aside solicitation claiming they never received it. When we protested that, in fact, the bid was filed on time, the AF proved utterly unwilling to pursue IT verification about the receipt of the email. Indeed, by way of explanation, we were told that our bid was indeed lower than the winning vendor's bid but that "the difference in price did not justified a change." The pattern that seems to have repeated itself in this case is one where a larger vendor with a higher price won a solicitation where FitNet offered a better price/value to the Air Force (Set Aside Sol # F4SVMP40780100). Obviously, if our solicitation was never received, we would have little complaint. However, their unwillingness to verify that we were treated fairly coupled with the pattern previously noted raises questions about the procurement process at Beale AFB.
- Pope AFB failed to 'stop performance' on an award made to a large company under a small business Set Aside solicitation even though our challenge to this award was filed in a timely manner and before delivery had taken place. Despite the fact that FitNet won this challenge, Pope AFB went ahead and completed the award to the larger competitor and brushed FitNet's challenge aside (Set Aside Sol # F23SVS22310900).

- Malmstrom AFB, Barksdale AFB and Seymour Johnson AFB all ignored 'contracting abuse' allegations over set aside purchases of exercise ergometers. In each of the cases, the protesting contractor, FitNet, had responded not only with better prices and best value to the government, but these timely offers were consistently passed up without just cause.

We even reported an alleged violation of the Sherman Act and requested an investigation but the AF refused to look into the issue. The AF simply discarded all the protests, claiming they "had abandoned the purchases of those type of products." Two of the AF units 'settled' with us through promises of set asides, but they have not yet come through. (Set aside Sol #s F24604-03-T-0011; F16602-03-Q-0073; F1610-03-P-0015 and 797FDF6030022).

- The Air National Guard failed to acknowledge a 'blunder' (their word) during the tabulation of vendor bids which had the effect of taking FitNet's bid out of the competitive range when in fact we had made the only qualified, competitive offer (one that fully met the original specifications). Furthermore, the ANG failed to comply - in a timely fashion - with a FOIA request. When they finally did respond, they provided information that had not been requested and that was essentially irrelevant. The contracting officer, we believe, resented the protest and has acted with prejudice to prevent us from lawfully receiving a follow-up award on a subsequent solicitation in which the contractor had offered a far superior product with a far better price. Both solicitations' awards totaled in excess of one million dollars (Set Aside SOL #s DAHA90-02-R-0019 and DAHA92-02-R-0018).
- The US Air Force Academy has twice dismissed FitNet's timely bids on products where we have offered a better price. In both cases, procurement personnel claimed that they had not received our bids after the contract had been awarded. However, in one of the cases we had already received acknowledgement of our offer! By way of explanation, the procurement officer later admitted that "they wanted to buy the product from the original supplier" even though the original solicitation indicated that 'equals' were acceptable. The personnel at the Air Force Academy admitted "procedural errors" but were not willing to make amends. (Set Aside Sol #s F05611-02-T0013 and F05611-02-P-0075).

Conclusions

Contracting abuse of small business set asides is an established fact. According to a recent Small Business Congressional Committee report: *"small businesses lose nearly \$9 Billion a year in work for the government due to unfair contracting practices."*

Most recently, I had the opportunity to bring a test case (SIZ-2004-11-24-73) to the government's OHA to prove my claims of Air Force contracting abuse. Federal Judge Christopher Holleman in his ruling said, *"The Air Force actions here are negligent at best, at worst, deliberate attempts to mislead SBA and this Office."*

As we have documented above, we have faced these unfair contracting practices on an overt, explicit and ongoing basis. In many cases, the safeguards meant to stop this abuse were simply ignored or circumvented.

We believe that this practice persists for the simple reason that small businesses seldom have the resources to challenge these practices. We recognize our good fortune in being able to document the cases, obtain the support of the Advocacy Community and demand for policy changes to prevent these instances from occurring again so that all small businesses can benefit.

In fiscal year 2006 the Air Force is expected to spend in excess of \$70 M in the athletic/fitness arena. It is simply wrong that so few of the meaningful contracts in this area will reach small businesses. It is particularly unfair because small businesses actually dominate the athletic/fitness field. The practice of systematically ignoring the advantages often offered by small vendors must be changed to make the playing field more level.

Furthermore, we are certain that an IG and/or a GAO investigation would reveal that the problem goes even deeper. I have little doubt, based on our experience, that the majority of the set aside contracts awarded by the Air Force have actually gone to large businesses and, in many cases, that these businesses have been inappropriately reported as small businesses. The government's Office of Hearings and Appeals (OHA) has found the Air Force favoring large businesses even after the SBA had ruled that a particular large business was affiliated – in violation of the FAR - with an alleged 'front' which bid on set-aside contracts. We must demand support and assistance in bringing a change to the Air Force culture so that small businesses will have a chance to serve our country.