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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: FitNet International Corporation

File: B-291986

Date: May 19, 2003

J. Raul Espinosa for the protester.

Maj. Arthur J. Coulter, Department of the Army, and Capt. Karri L. Garrett, Department of the Air Force, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's determination to award a contract to a firm other than the protester is unobjectionable and does not evidence bad faith where the protester concedes that its proposal, which was evaluated as "unsatisfactory" with "high risk" by the agency under the technical factor, was "incomplete," and the protester failed to submit a final revised proposal after discussions, as the agency requested.

DECISION

FitNet International Corporation protests the award of a contract to FitnessAge Services, Inc., under request for proposals (RFP) No. DAHA90-02-R-0018, issued by the National Guard Bureau, for a composite physiological fitness assessment program.

We deny the protest.

The RFP, issued as a set-aside for small businesses, provided for the award of a fixed-price contract for a "systematic program for the collection of fitness assessment data, a final individual fitness assessment summary and executive management reports." RFP at 11. The RFP stated that award would be made to the offeror whose proposal represented the best value to the government, based upon technical, past performance, and price evaluation factors. The solicitation informed offerors that "[n]on-price factors, when combined, are significantly more important than price," RFP at 1, and included an evaluation matrix listing numerous evaluation criteria to be considered by the agency in the technical and past performance evaluations.

Four proposals, including FitNet's and FitnessAge's, were received by the RFP's closing date. FitNet's proposal was evaluated as "unsatisfactory" with "high risk" under the technical factor, and "very good" with "low risk" under the past performance factor, at a proposed price of \$143,375. FitnessAge's proposal was evaluated as "good" with "moderate risk" under the technical factor, and "exceptional" with "low risk" under the past performance factor, at a price of \$605,000. Agency Report (AR), Tab 16, Comparative Analysis Report, at 8.

The contracting officer determined that each of the four proposals contained deficiencies and required clarifications, and included all in the competitive range. Written discussion questions were forwarded to the offerors, and responses to the written discussions were received and evaluated. The contracting officer determined that further discussions were necessary, and written discussion questions were forwarded to the offerors and oral discussions were conducted. Letters requesting final revised proposals (FRP) were next provided to the offerors, and FRPs were received from each of the competitive range offerors, except FitNet.

The contracting officer contacted FitNet after the time for FRP submission had passed to ensure that FitNet's FRP had not been overlooked or misplaced. At this time, FitNet requested an extension in order to submit a FRP. FitNet's request for an extension was denied by the contracting officer. FitNet subsequently informed the contracting officer by electronic mail that it "wish[ed] to have [its] original proposal" considered. AR, Tab 14, E-mail from FitNet to Contracting Officer (Dec. 14, 2002).

FitnessAge's FRP was evaluated as "excellent" with "low risk" under the technical factor, and "exceptional" with "low risk" under the past performance factor, at a proposed price of \$605,000. AR, Tab 16, Comparative Analysis Report, at 8. The contracting officer determined, while considering FitNet's initial proposal as requested by FitNet (which had been rated "unsatisfactory" with "high risk" under the technical factor), that the proposal submitted by FitnessAge represented the best value to the government. Award was made to that firm, and after requesting and receiving a debriefing, FitNet filed this protest.

FitNet protests that the specifications pertaining to the measurement of physiological age "were specific in every detail to the winning bidder's . . . patent," and therefore improper. Protester's Comments at 2.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. They specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of proposals must be filed before that time. 4 C.F.R. § 21.2(a)(1) (2003). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Dominion Aviation, Inc.—Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3. FitNet's protest here, contending that the terms of the

solicitation were specific to a patent held by the awardee, was untimely given that it was not filed until after the agency had awarded a contract under the RFP.¹

FitNet also argues that the agency should have considered FitNet's initial proposal as amended through its written responses to the clarification requests and deficiencies identified by the agency, and to discussions, rather than only its initial proposal, which, according to FitNet, "was known to be incomplete." Protester's Comments at 2.

The record establishes that the agency requested in writing that each competitive range offeror "submit a final proposal, with all the required documentation." The agency's letters to the offerors added here that "[i]f you elect not to submit a final proposal, or if your original proposal is still valid, please confirm this in writing." AR, Tab 13, Request for Final Proposals (Dec. 6, 2002). Notwithstanding the agency's request, FitNet did not submit a final proposal (or anything else), but rather, after being contacted by the agency after the time for submission had passed, specifically stated that it wished to have its original proposal considered. Given the protester's failure to respond to the agency's request for final proposal revisions, as well as the protester's subsequent request to have its "original proposal" considered, we cannot object to the agency's consideration of only FitNet's original proposal.

FitNet finally contends that the agency's award to FitnessAge, rather than FitNet, was in retaliation for FitNet's complaints regarding its failure to receive an award under another solicitation. We will not attribute unfair or prejudicial motives to contracting officials on the basis of inference or supposition. Holiday Inn; Baymont Inn & Suites, B-288099.3, B-288099.4, Sept. 20, 2001, 2001 CPD ¶ 166 at 4. Here, the record demonstrates that FitNet's failure to receive an award under this solicitation is attributable to FitNet's submission of a proposal that it concedes was incomplete and was evaluated as technically unsatisfactory, and its failure to submit a FRP after discussions, as requested by the agency. In our view, there is nothing in the record

¹ We note that FitNet's contentions here appear to be inconsistent with its position during the competition. In this regard, the record reflects that following discussions during which the contracting officer had informed FitNet that its proposal did not comply with the solicitation's requirements regarding the development of a physiological age for individuals, the protester informed the contracting officer that it believed that FitNet could "meet [the agency's] requirements within the framework of the proposal that [FitNet had] already submitted" and that its proposed solution "would not run afoul of another vendor's patents." AR, Tab 14, E-mail from FitNet to Contracting Officer (Dec. 13, 2002).

that in any way supports the allegation that the agency's selection of Fitness Age's proposal for award, rather than FitNet's, was made in bad faith or in retaliation of any complaints FitNet may have made.

The protest is denied.

Anthony H. Gamboa
General Counsel