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**Comptroller General  
of the United States**

**United States Government Accountability Office  
Washington, DC 20548**

## Decision

**Matter of:** Latvian Connection, LLC

**File:** B-410947

**Date:** March 31, 2015

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Keven L. Barnes, for the protester.

Dennis Gallagher, Esq., Department of State, and Laura Mann Eyester, Esq., Small Business Administration, for the agencies.

Cherie J. Owen, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

Protest is sustained where FedBid, acting as the agent for the contracting agency, excluded the protester, a small business, from the competition based on a perceived lack of business integrity, in effect making a negative responsibility determination, without referring the matter to the Small Business Administration under the Certificate of Competency procedures.

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### **DECISION**

Latvian Connection, LLC, of Kuwait City, Kuwait, challenges its exclusion from the competition under solicitation No. FY15RR0024 (also identified as FedBid Buy No. 693101), issued by the Department of State (DOS) for first aid kits and related medical supplies. Latvian Connection argues that it has been improperly excluded from competing for this procurement, which is being conducted on behalf of the agency by FedBid, Inc.

We sustain the protest.

### **BACKGROUND**

The solicitation, issued on December 19, 2014, and set aside for small businesses, sought a contractor to provide first aid kits and related medical supplies to be used in a training exercise, to be conducted from May 10 to May 28, 2015, with the Jordanian Police Force at the Jordanian International Police Training Center in Jordan. The procurement was conducted through FedBid, a commercial online procurement services provider that operates a website at [www.FedBid.com](http://www.FedBid.com) which,

among other things, hosts reverse auctions. The estimated value of the procurement was approximately \$5,000. Agency Report (AR), Tab 1, FedBid Buy Details.

The procurement here was being conducted using FedBid's reverse auction platform. In order to respond to solicitations posted on FedBid, prospective vendors or offerors must have a valid FedBid account. FedBid's terms of use provide that "FedBid may refuse the Services to any person or any entity at any time, in FedBid's sole discretion." <http://www.fedbid.com/terms>.

FedBid suspended the protester's account on July 8, 2014. Protest, Attach. 9, FedBid Suspension E-mail, July 8, 2014, at 1. In this regard, FedBid provided the protester with the following explanation of the decision to suspend it:

System and Business Integrity: Latvian Connection has taken actions to repeatedly and purposely interfere with FedBid's business relationships.

Right to Terminate: Latvian Connection's use of the FedBid marketplace demonstrates that Latvian Connection has not used (and does not intend to use) the FedBid marketplace as required in the FedBid Terms of Use.

Id.

Since Latvian Connection's FedBid account was suspended, the firm was unable to compete for the procurement. Latvian Connection filed this bid protest prior to the January 2, 2015 closing date, challenging its inability to compete for this requirement.

## DISCUSSION

Latvian Connection argues that its exclusion from the competition constitutes either a negative responsibility determination, which should have been referred to the Small Business Administration (SBA), or an improper de facto debarment.

### Interested Party Status

As a preliminary matter, DOS contends that Latvian Connection is not an interested party to protest this procurement, arguing that the protester's mere assertion that it would submit an offer, if permitted to do so, lacks credibility given the firm's lack of experience in federal government contracting and history of protesting a wide array of procurements. AR at 7. The agency also argues that Latvian Connection's protest makes no representations to demonstrate that it had the actual capacity or intention to submit an offer. Id.

Under our Bid Protest Regulations, we will only consider protests filed by an “interested party,” that is, an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a). Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party’s status in relation to the procurement. Advanced Concept Enterprises, Inc., B-410069.3, B-410069.4 Jan. 22, 2015, 2015 CPD ¶ 53 at 2.

Here, we find that Latvian Connection has sufficiently established its status as an interested party. The protester indicates that it has relationships with two medical suppliers and two shipping companies with whom it will team to fulfill the solicitation’s requirements.<sup>1</sup> Protester’s E-mail Response to GAO, Jan. 21, 2015. These requirements, again, were estimated to total only approximately \$5,000. FedBid Buy Details. In these circumstances, we find that, for this procurement, Latvian Connection has sufficiently established its status as an interested party.

#### Responsibility Determination

Latvian Connection argues that its exclusion from the competition constituted a negative responsibility determination with respect to a small business, which therefore should have been referred to the SBA under its Certificate of Competency (COC) procedures. Protest at 14. The SBA, which submitted comments to our Office in response to the protest, likewise asserts that the actions of DOS and FedBid constituted a de facto nonresponsibility determination, which should have been referred to the SBA under its COC procedures. SBA Comments, Feb. 26, 2015, at 2-5. DOS, however, responds that there was no responsibility determination by the agency here since Latvian Connection never submitted a response to the solicitation and, in any case, FedBid acted to suspend Latvian Connection without direction or encouragement from DOS. AR at 9; Agency Response to SBA’s Comments at 2.

Under the Small Business Act, agencies may not find a small business nonresponsible without referring the matter to the SBA, which has the ultimate authority to determine the responsibility of small businesses under its COC

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<sup>1</sup> According to the agency, Latvian Connection was awarded a purchase order for medical and surgical equipment or supplies in the amount of \$113,000 in 2011, but the funds for this contract were later deobligated. AR at 6. The record does not demonstrate the basis for the later deobligation.

procedures. 15 U.S.C. § 637(b)(7); FAR subpart 19.6; FitNet Purchasing Alliance, B-410263, Nov. 26, 2014, 2014 CPD ¶ 344 at 6-7. In this regard, the Small Business Act provides that it is the SBA's duty:

To certify to Government procurement officers . . . with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity, of any small business concern or group of such concerns to receive and perform a specific Government contract.

15 U.S.C. § 637(b)(7)(A) (emphasis added). Importantly, this section of the Act also provides that a "Government procurement officer . . . may not, for any reason specified in the preceding sentence preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the Administration." Id.

Here, Latvian Connection was suspended from use of FedBid. Under FedBid's rules, therefore, Latvian Connection was ineligible to respond to DOS's solicitation, and thereby precluded from competing or being awarded a contract. The basis of Latvian's suspension was the firm's lack of "System and Business Integrity." FedBid Suspension E-mail, July 8, 2014, at 1. Although FedBid, a private company, was the entity that precluded Latvian's ability to compete for the contract, we have previously held that when FedBid hosts a reverse auction on its website, it acts as an agent for the agency conducting the procurement. AeroSage LLC, B-409627, July 2, 2014, 2014 CPD ¶ 192 at 4. As a result, we conclude that the DOS, through its agent, FedBid, precluded Latvian Connection, a small business, from competing for, and potentially being awarded, a contract on the basis of the firm's integrity, without referring the matter to the SBA. This amounted to a determination of nonresponsibility, which the agency should have referred to the SBA for a COC determination. Therefore, we sustain the protest on this basis.

#### De Facto Debarment

Latvian Connection also contends that its suspension constitutes a de facto debarment. Protest at 2. In response, the agency states that

Protester comes closer to the truth than does SBA in characterizing its situation as a [FedBid] de facto debarment . . . . FEDBID has certainly excluded Protester from doing business on the FEDBID reverse auction platform and has indicated its intent to continue this exclusion indefinitely. The impact of this exclusion is plainly similar to a debarment.

Agency Response to SBA's Comments at 2-3.

However, as the agency notes, our Office no longer reviews protests that an agency improperly suspended or debarred a contractor from receiving government contracts. Logan, LLC, B-294974.6, Dec. 1, 2006, 2006 CPD ¶ 188 at 7; 4 C.F.R. § 21.5(i). We have instead determined that suspension and debarment matters are properly for review by the contracting agency in accordance with the applicable provisions of the FAR. Logan, LLC, supra; Triton Elec. Enters., Inc., B-294221 et al., July 9, 2004, 2004 CPD ¶ 139 at 2; Shinwha Elecs., B-290603 et al., Sept. 3, 2002, 2002 CPD ¶ 154 at 5. Therefore, we have no jurisdiction to address Latvian's allegation that its suspension constitutes a de facto debarment.

#### RECOMMENDATION

In its comments, the SBA states that if Latvian Connection is denied the opportunity to submit a response to the solicitation, the matter should be referred to the SBA for a COC determination. The record, however, indicates that during the pendency of the protest, the agency elected to override the automatic stay of performance based on urgent and compelling circumstances. Performance Stay Override, January 20, 2015, at 1. Further, the solicitation required delivery of the supplies within 60 days of award. Id. Since performance of the contract is concluded and the protester was not permitted to submit an offer, there is no opportunity to refer Latvian to the SBA for a COC determination here. In these circumstances, we recommend that DOS reimburse the protester the costs of filing and pursuing its protest. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Susan A. Poling  
General Counsel