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**Comptroller General  
of the United States**

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

## Decision

**Matter of:** Homecare Products, Inc.

**File:** B-408898.2

**Date:** March 12, 2014

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Mark R. Thomas, Esq., Reid Law PC, for the protester.  
Melody A. Goldberg, Esq., Department of Veterans Affairs, for the agency.  
Paula A. Williams, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest of terms of solicitation for the establishment of a blanket purchase agreement for prosthetic ramps and ramp installation services arguing that the requirement should be obtained through the Federal Supply Schedule (FSS) is denied where the agency reasonably determined that the requirements could not be satisfied under the FSS.

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### DECISION

Homecare Products, Inc., of Algona, Washington, protests the terms of request for quotations (RFQ) No. VA251-13-Q-0455 issued by the Veterans Administration (VA) for the establishment of blanket purchase agreements (BPA) for the purchase, delivery, and installation of prosthetic ramps. Homecare, a small business vendor holding a General Services Administration (GSA), Federal Supply Schedule (FSS) contract, challenges the VA's decision to conduct the competition on the open market, rather than limit the procurement to vendors holding FSS contracts.

We deny the protest.

The VA provides ramps for veterans' homes as part of the prosthetics clinical management program. The required products and services include the delivery and installation of threshold and modular ramps at the primary homes of qualified veterans to accommodate access/egress issues, as well as the purchase and delivery of portable ramps to qualified veterans.

Prior to issuing the solicitation, the VA conducted market research by posting a sources sought notice on GSA's e-buy website to identify potential vendors capable

of meeting the agency's requirements to provide prosthetic ramps and ramp installation services at the veterans' homes. Agency Report (AR) exh. 3, GSA e-Buy, Sources Sought (March 2013). Fifteen small business vendors responded to the e-buy notice, including EZ Access, a division of Homecare. After reviewing the pricing schedules furnished by these FSS contract holders, the agency found that the ramp installation services were not included in the FSS vendors' line item pricing. Contracting Officer Statement at 1-2.

In July 2013, the contracting officer posted a sources sought notice on the Federal Business Opportunities website (FedBizOpps)<sup>1</sup> to identify small business firms capable of meeting the agency's requirements for the ramps and installation services. AR exh. 6, FedBizOpps (July 18, 2013). Multiple small businesses responded and the agency found that these firms were capable of providing the required supplies and services. Based on the results of this market research, the agency decided to establish the BPAs as open market items.

On August 19, the VA posted a presolicitation notice on the FedBizOpps website announcing the agency's intent to issue the solicitation as a total small business set-aside using FAR part 12 and FAR part 13 procedures for the establishment of BPAs to furnish, deliver, and install the prosthetic ramps. The notice also included North American Industry Classification System (NAICS) code 339113, Surgical Appliance and Supplies Manufacturing, with a small business size standard of 500 employees. AR exh. 8, FedBizOpps Presolicitation Notice.

The RFQ contemplates the establishment of a single or multiple fixed-price BPAs, with a 5-year ordering period, and as amended, the solicitation instructed firms to submit their quotations by December 4, 2013. Seven vendors, including the protester, submitted timely quotations. Contracting Officer Statement at 2. This protest to our Office was filed on December 3.

Homecare contends that the VA is required to procure the ramps using the FSS, since the ramps are readily available for purchase through the FSS, and that the installation services should be separately purchased from the FSS vendors when the ramps are ordered, since the cost for each installation would be under the micro-purchase threshold. Protest at 1-2; Protester's Comments at 4-6.

As a general matter, the FSS program gives federal agencies a simplified process for obtaining commonly used commercial supplies and services. See generally FAR subpart 8.4. In FSS buys, as in other procurements, the determination of what the agency needs, and which products or services meet those needs, is within the

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<sup>1</sup> FedBizOpps, [www.fbo.gov](http://www.fbo.gov), is the government-wide point of entry for the electronic publication of solicitation notices. Federal Acquisition Regulation (FAR) § 2.101 (2010).

agency's discretion. Draeger Safety, Inc., B-285366, B-285366.2, Aug. 23, 2000, 2000 CPD ¶ 139 at 4. Contracting agencies may only place orders with an FSS vendor whose schedule contract contains the goods or services sought by the government. Altos Fed. Group, Inc., B-294120, July 28, 2004, 2004 CPD ¶ 172 at 4. The sole exception to this requirement is for items that do not exceed the micro-purchase threshold of \$3,000 since such items may be purchased outside the normal competition requirements. FAR §§ 13.201, 13.202; see SMS Sys. Maint. Servs., Inc., B-284550.2, Aug. 4, 2000, 2000 CPD ¶ 127 at 2; CourtSmart Digital Sys., Inc., B-292995.2, B-292995.3, Feb. 13, 2004, 2004 CPD ¶ 79 at 5.

As noted above, the VA conducted market research to identify potential FSS vendors capable of meeting the agency's need to purchase both prosthetic ramps and ramp installation services.<sup>2</sup> In reviewing the responses to the e-buy posting, the agency found that ramp installation services were not included in the vendors' FSS contracts. Nonetheless, the protester maintains that the agency should establish the BPA's under the FSS and simply order installation services from the FSS contractors as non-FSS items under the micro-purchase authority. We disagree. The agency properly concluded that this was not a viable acquisition strategy since the total value of the non-FSS portion of the requirement (the ramp installation services) significantly exceeds the \$3,000 micro-purchase threshold over the contemplated 5-year ordering period.<sup>3</sup> As we explained in SMS Sys. Maint. Servs., Inc., *supra*, an agency may properly consider the overall value of items to be ordered during the life of a FSS contract for the purpose of determining whether non-FSS items or services would exceed the micro-purchase threshold. Moreover, because contracting officers are prohibited from dividing requirements into several purchases to avoid exceeding the micro-purchase threshold, *see id.*, the VA properly considered the overall value of all the installation requirements, as opposed to the value of each order, when it decided on the appropriate acquisition strategy.

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<sup>2</sup> The protester questions the validity of this market research, alleging that "there is no evidence that such research was conducted, only a reference to same in the Contracting Officer's Response." Protester's Comments at 2. However, in its agency report, the VA provided a copy of the GSA e-Buy sources sought notice and a list of the fifteen FSS vendors (including EZ Access, a division of Homecare) that responded to the notice. AR exhs. 3-5. In its comments on the agency report, the protester has not provided any evidence to refute the contemporaneous record provided by the agency and we will not conclude that the market research was conducted improperly on the basis of inference or supposition. See Novell Pharm., Inc., B-255374, Feb. 24, 1994, 94-1 CPD ¶ 149 at 7. This protest ground is denied.

<sup>3</sup> Specifically, the agency estimates ordering a minimum of 200 modular ramps annually for a total of 1000 modular ramps. The labor and installation cost for each ramp is estimated to be a maximum of \$900.00 with an overall estimated cost of \$900,000. Contracting Officer Statement at 3.

Next, Homecare appears to argue that the agency impermissibly bundled its acquisition for prosthetic ramps and ramp installation services without first justifying the necessity to combine the requirements and without providing “proper notification” to the Small Business Administration (SBA) regarding the bundled procurement, in contravention of the Small Business Act and the FAR. Protester’s Comments at 6-7.

The protester’s allegations in this regard are misplaced. The Small Business Act, as amended, requires that “to the maximum extent practicable,” each agency shall “avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors.” 15 U.S.C. § 631(j)(3); see also 2B Brokers et al., B-298651, Nov. 27, 2006, 2006 CPD ¶ 178 at 9. Bundling, for purposes of the Small Business Act, as amended, is defined as “consolidating 2 or more requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern.” 15 U.S.C. § 632(o)(2); see FAR § 2.10. Thus, a necessary predicate for the application of the Small Business Act’s anti-bundling provisions is the issuance of a solicitation that effectively “precludes small business participation” or one that is unsuitable for award to small businesses. Here, however, the solicitation has been issued as a total small business set-aside and small business firms, such as the protester, will be competing for the BPAs. As a result, there is no possible violation of the Small Business Act’s restrictions on bundling.

Finally, for the first time in its comments on the agency report, Homecare suggested that the solicitation is defective because the VA did not use the correct NAICS code for the solicited ramp installation services. Protester’s Comments at 3-4. The allegations in this regard are untimely as they were not raised prior to the date for receipt of quotations. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1); see JAVIS Automation & Eng’g, Inc., B-290434, B-290434.2, Aug. 5, 2002, 2002 CPD ¶ 140 at 7 n.11. Moreover, they raise matters outside the scope of our bid protest jurisdiction. Questions regarding proper NAICS code designations are for resolution by the SBA, which has exclusive authority over NAICS code determination appeals.

See FAR § 19.303(c); 13 C.F.R. § 121.1102. Because an agency's choice of an NAICS code is a matter for review by the SBA, it is not a matter for consideration by our Office. 4 C.F.R. § 21.5(b); Expeditions Int'l Travel Agency, B-252510, June 28, 1993, 93-1 CPD ¶ 497 at 4.

The protest is denied.

Susan A. Poling  
General Counsel