



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

Decision

Matter of: Walker Development & Trading Group

File: B-411357

Date: July 8, 2015

Terrance Walker for the protester.

Jeanne S. Morris, Esq., Department of Veterans Affairs, for the agency.

Paula A. Williams, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency is not required to evaluate whether a solicitation should be set aside for small businesses before purchasing goods or services through the Federal Supply Schedule program.

DECISION

Walker Development & Trading Group, of Reno, Nevada, a small business concern, protests the issuance of a task order to LifeWatch Services, Inc., of Rosemont, Illinois, by the Department of Veterans Affairs (VA), under LifeWatch's Federal Supply Services (FSS) contract No. V797P-4167B, Federal Supply Classification (FSC) Group 65, Medical Equipment and Supplies. Walker argues that the agency improperly failed to consider whether there were two or more small businesses capable of providing the services outside the FSS program prior to deciding to acquire the services from LifeWatch under its FSS contract.

We deny the protest.

The VA Medical Center in West Haven, Connecticut provides cardiac home monitoring services for veterans through the use of a medical device known as the holter monitor. To meet an immediate need for holter monitoring services, the VA decided to conduct an FSS buy, and the contract specialist conducted research to identify FSS contractors offering suitable items. Based on this research, the VA concluded that LifeWatch was the only schedule contract holder capable of meeting the agency's needs. On April 3, the VA issued a fixed-price task order to LifeWatch

under its FSS, FSC Group 65 contract, which is administered by the VA National Acquisition Center.¹ AR exh. G, Standard Form 1449 (Apr. 3, 2015). On April 7, Walker, which does not hold an FSS contract, protested the issuance of the order to our Office.

The essence of Walker's protest is that the agency was required to conduct market research to determine if the acquisition should have been set-aside for small business participation before using the FSS. Walker contends that the agency's failure to conduct market research and to subsequently set aside this acquisition for competition among small business concerns violates the Small Business Act, 15 U.S.C. § 644(a), as implemented by Federal Acquisition Regulation (FAR) § 19.502-2(b). This regulation requires that an acquisition with an anticipated dollar value of more than \$150,000 must be set aside for small business concerns if the agency determines that there is a reasonable expectation of receiving fair market offers from at least two responsible small business concerns (the so-called Rule of Two).² The protester asserts that there were at least two other small business concerns listed in the system for award management database that were capable of providing the solicited requirements at fair and reasonable prices. Under such circumstances, Walker argues, the VA was required to set aside this acquisition for small business concerns.

The VA responds that it was not required to evaluate whether there were two or more small businesses capable of providing the services prior to deciding to purchase them through the FSS program.

We agree with the agency. The regulations that implement the FSS program expressly exclude FSS purchases from the set-aside requirements in FAR part 19. Specifically, FAR § 8.404(a) provides that FAR part 19 does not apply to orders placed against FSS contracts. Similarly, FAR § 38.101(e) provides that the

¹ The General Services Administration is normally responsible for FSS procurements, but it has delegated to the VA the authority to procure goods or services within FSC Group 65-II A, Medical Equipment and Supplies, such as those being solicited here. FAR § 8.402(a).

² We note that while the protester cites to FAR § 19.502-2(b), which pertains to acquisitions with an anticipated dollar value of over \$150,000, the contract specialist reports that the estimated price for the acquisition here was under \$150,000. AR exh. E (Contracting Specialist's Narrative). Accordingly, the applicable regulatory section is FAR § 19.502-2(a), which provides that a procurement with an anticipated dollar value of more than \$3,000 but less than \$150,000 must be set aside for small business concerns unless the agency determines that there is not a reasonable expectation of receiving offers from at least two responsible small business concerns that are competitive in terms of market prices, quality, and delivery.

requirements of Part 19 apply at the acquisition planning stage prior to issuing the schedule solicitation and, generally, do not apply to orders placed under resulting schedule contracts.³ Based on the preceding sections of the FAR, we have previously concluded 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. Kingdomware Techs., Inc., B-405533.2, Nov. 10, 2011, 2011 CPD ¶ 251 at 3; Edmond Computer Co.; Edmond Sci. Co., B-402863, B-402864, Aug. 25, 2010, 2010 CPD ¶ 200 at 3.⁴

The protest is denied.

Susan A. Poling
General Counsel

³ In addition, FAR § 19.502-1(b) provides that the small business set-aside requirements do not apply to purchases from required sources of supply under Part 8 such as FSS contracts.

⁴ The agency also argued that Veterans Administration Acquisition Regulation (VAAR), 48 C.F.R. § 808.002(a)(3) makes the FSS, FSC Group 65 contract, a required source of supply for the solicited requirements, thereby exempting the agency from the requirement to assess the availability of small business sources prior to acquiring them via the FSS. Given our conclusion above 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, we need not consider this argument.