



## Decision

**Matter of:** Aldevra

**File:** B-405271; B-405524

**Date:** October 11, 2011

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Rodney Marshall, for the protester.

Brian R. Reed, Esq., and Dennis J. Kulish, Esq., Department of Veterans Affairs, for the agency.

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### DIGEST

Protest that Department of Veterans Affairs (VA) improperly used non-mandatory Federal Supply Schedule procedures to procure items, rather than using a set-aside for service-disabled veteran-owned small businesses, is sustained, where the applicable statute—the Veterans Benefits, Health Care, and Information Technology Act of 2006—and implementing regulations require the VA to use such set-asides where the statutory prerequisites are met.

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### DECISION

Aldevra, of Portage, Michigan, a service-disabled veteran-owned small business (SDVOSB) concern protests the terms of solicitation No. VA-69D-11-RQ-1170 (RQ-1170), issued by the Department of Veterans Affairs (VA) for a tilting skillet/braising pan and one countertop electric griddle for the Federal Health Care Center in Chicago, Illinois. Aldevra also protests the terms of the VA's solicitation No. 693-11-4-179-0306 (179-0306), issued to procure two griddles and one food slicer for the VA Medical Center in Wilkes-Barre, Pennsylvania. Aldevra asserts that the agency improperly failed to comply with applicable statutes and regulations to determine if these procurements should be set aside for such firms.

We sustain the protests.

## BACKGROUND

These procurements currently are being conducted pursuant to General Services Administration (GSA) Federal Supply Schedule (FSS) procedures and implementing regulations, set forth at Federal Acquisition Regulation (FAR) Subpart 8.4. In accordance with those regulations, the procurements were issued on an unrestricted basis to vendors holding FSS contracts under schedule 73.

The sole issue in the protests is whether the VA is required to conduct market research to determine if the procurements should be set aside for SDVOSB concerns before using the FSS. The protester asserts that the agency's failure to do so, and to subsequently set aside the procurement, if appropriate, violated the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128 (2006) (the 2006 VA Act). In relevant part, 38 U.S.C. § 8127(d), provides as follows:

. . . a contracting officer of [the VA] shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

The statute also sets out an order of priority for the contracting preferences it establishes, providing that the first priority for contracts awarded pursuant to 38 U.S.C. § 8127(d) shall be given to SDVOSB concerns, followed by veteran owned small businesses (VOSBs). 38 U.S.C. § 8127(i).<sup>1</sup>

The VA issued regulations implementing the 2006 Act which, as relevant here, state as follows:

(a) . . . . Except as authorized by 813.106, 819.7007 and 819.7008<sup>2</sup>, the contracting officer shall set aside an acquisition for competition restricted to SDVOSB concerns upon a reasonable expectation that:

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<sup>1</sup> Although this decision addresses the priority of SDVOSB set asides as compared to the FSS, the discussion applies equally to VOSB set asides as compared to the FSS under the VA Act.

<sup>2</sup> These references are to other provisions in the Veterans Administration Acquisition Regulation concerning the use of other than competitive procedures to enter into contracts with an SDVOSB or VOSB concern (48 C.F.R. § 813.106), and procedures  
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(1) Offers will be received from two or more eligible SDVOSB concerns and;

(2) Award will be made at a reasonable price.

Veterans Administration Acquisition Regulation (VAAR), 48 C.F.R. § 819.7005(a) (2010).

The protester asserts, and the agency concedes, that there are at least two SDVOSBs capable of meeting the agency's requirements under solicitation RQ-1170. Agency Report (AR), July 20, 2011, at 2. The agency has not conceded that there are at least two SDVOSB concerns capable of meeting the agency's requirements under solicitation 179-0306.

## DISCUSSION

VA argues that neither the VA Act, nor the VA's implementing regulations, require the agency to consider SDVOSB and VOSB set-asides prior to determining whether to purchase goods or services through the FSS program. AR, July 20, 2011, at 3; AR, Sept. 27, 2011, at 2. The agency contends that it has the discretion to determine whether to meet its requirements through the FSS before procuring from other sources—such as SDVOSBs or VOSBs. Id.

We see nothing in the VA Act or the VAAR that provides the agency with discretion to conduct a procurement under FSS procedures without first determining whether the acquisition should be set aside for SDVOSBs. The provisions of both the VA Act and the VAAR are unequivocal; the VA "shall" award contracts on the basis of competition restricted to SDVOSBs where there is a reasonable expectation that two or more SDVOSBs will submit offers and award can be made at a fair and reasonable price.<sup>3</sup> Thus, contrary to the agency's position, the VA Act requires, without limitation, that the agency conduct its acquisitions using SDVOSB set asides where the necessary conditions are present. 38 U.S.C. § 8127-8128.

Moreover, since the agency concedes that there are at least two SDVOSBs capable of meeting its requirements under solicitation RQ-1170, it must set this requirement aside exclusively for SDVOSBs. Because the agency did not conduct market

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for the award of sole-source contracts to SDVOSB and VOSB concerns (48 C.F.R. §§ 819.7007, 819.7008).

<sup>3</sup> The VAAR does specify three exceptions to the requirement to set aside acquisitions for SDVOSB concerns (relating to other than competitive and sole-source acquisition procedures), but electing to acquire goods and services under the FSS is not one of those exceptions.

research to determine if there are two or more SDVOSB concerns capable of performing the requirements under solicitation 179-0306, it must conduct market research and, if it determines that there are two or more firms capable of performing the requirements, it must set this requirement aside exclusively for SDVOSB concerns.<sup>4</sup>

In our view, the discussion above disposes of the question raised by this protest. The VA has argued, however—in pleadings filed in response to this protest, and in pleadings filed in several other protests currently pending before our Office—that it addressed and resolved the applicability of the VA Act to the FSS when it promulgated the above-quoted provisions of the VAAR. AR, July 20, 2011, at 6-7; AR, Sept. 27, 2011, at 3.

The comments on the agency’s proposed regulations, and the agency’s responses in answer to those comments, were published in the Federal Register, which included the following exchange addressing the applicability of the VA Act to FSS acquisitions:

Comment: VA received a comment stating that the proposed rule was unclear whether it was intended to be applicable to task and delivery orders under the Federal Supply Schedule (FSS). The commenter indicated that although GSA [General Services Administration] has delegated to VA the authority to administer certain schedules, the delegation does not extend to policy implementation. The commenter recommended a revision stating that SDVOSB and VOSB set-asides and sole source provisions do not apply at the FSS order level.

Response: We disagree with the commenter and reject the suggestion because this rule does not apply to FSS task or delivery orders. VA

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<sup>4</sup> The VA also argues that FAR § 8.002 identifies a priority list of sources, including, for example, agency inventories, excess from other agencies and mandatory FSS contracts. AR, July 20, 2011, at 5-6. The agency argues that it is “inconceivable” that it would have to procure its requirements from SDVOSBs in instances where it can meet its needs through these other sources. Id. at 6.

We need not consider these other programs in deciding the instant case. The agency has specifically advised our Office that, to the extent its current requirements are available under the FSS, they are included on a non-mandatory schedule. See Murray-Benjamin Electric, Co., LP, B-298481, Sept. 7, 2006, 2006 CPD ¶ 129 at 3 (use of a non-mandatory FSS contract is voluntary on the part of the agency). Our decision today does not address the interrelationship of the VA Act to these other programs, and is limited to the interrelationship of VA Act’s requirements to purchases from non-mandatory FSS sources.

does not believe a change to the regulation is needed, and 48 CFR part 8 procedures in the FAR [Federal Acquisition Regulation] will continue to apply to VA FSS task/delivery orders. Further, VA will continue to follow GSA guidance regarding applicability of 48 CFR part 19 of the FAR, Small Business Programs, which states that set-asides do not apply to FAR part 8 FSS acquisitions.

74 Fed. Reg. 64619 (Dec. 8, 2009).<sup>5</sup> As stated above, the VA contends that this commentary addressed and resolved the applicability of the VA Act to FSS acquisitions. The VA also contends that it reasonably relied on the FAR in concluding that the VA Act does not apply to FSS acquisitions.<sup>6</sup>

As the VA correctly points out, FAR § 8.404 (a) expressly provides that the requirements related to small businesses in FAR part 19 are inapplicable to FSS acquisitions with the exception of FAR § 19.202-1 (e)(1)(iii) (not relevant here).<sup>7</sup> FAR part 19 includes requirements relating to various small business programs.

Of relevance here, FAR subpart 19.14 includes provisions relating to one program for the award of contracts to SDVOSBs; this is the only subpart of FAR part 19 that addresses set-asides for SDVOSBs. Subpart 19.14, however, implements the requirements of the Veterans Benefit Act of 2003, which was codified at 15 U.S.C. § 657f (2006), and applies government-wide. See FAR § 19.1402. The 2006 VA Act, which is codified at 38 U.S.C. §§ 8127, 8128, applies only to VA procurements. See *Angelica Textile Servs., Inc. v. U.S.*, 95 Fed. Cl. 208, 222 (2010) (noting that the VA is the only agency to which the requirements of the Veterans Benefits Act of 2006 apply).

In addition—and in contrast to the 2006 VA Act at issue here—the Veterans Benefit Act of 2003 provides, in relevant part, that:

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<sup>5</sup> A second comment/response, to which VA does not cite, also was published in the Federal Register, stating, among other things, that “the proposed rule should apply to FSS orders since VA purchases approximately 60 percent of its goods and services through the FSS.” 74 Fed. Reg. 64619 (Dec. 8, 2009). The VA’s response to this comment reiterated the agency’s position that “FSS contracts are governed by policy developed by GSA, which has determined that set-asides do not apply to FSS orders.” Id.

<sup>6</sup> We solicited the views of GSA in connection with the protest docketed as B-405271. GSA deferred to VA because the case involves interpretation of a statute that applies only to VA.

<sup>7</sup> FAR § 8.404(a) also provides that the requirements of FAR parts 13, 14 and 15 are inapplicable to FSS procurements.

In accordance with this section, a contracting officer may award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by service-disabled veterans will submit offers and that award can be made at a fair market price.

15 U.S.C. § 657f (b) (emphasis added).

Simply stated, the 2003 government-wide program is separate and distinct from the VA-specific program created by the VA Act of 2006. As a result, the FAR language implementing the 2003 Act—and exempting the FSS program (among other programs<sup>8</sup>) from its requirements—has no application to the statute at issue here. In addition, the program created by the 2003 statute is permissive in nature, insofar as it provides that contracting officers “may” restrict competition to SDVOSBs in appropriate circumstances. See, e.g., Mission Critical Solutions, B-401057, May 4, 2009, 2009 CPD ¶ 93 at 3.

In light of these considerations, we conclude that the exception in the FAR that permits agencies to award task and delivery orders under the FSS without regard to government-wide small business programs—including the SDVOSB set-aside program created by the 2003 statute (and implemented by FAR subpart 19.14)—does not govern, or apply to, the SDVOSB set-aside program created by the Veterans Benefits, Health Care, and Information Technology Act of 2006.<sup>9</sup>

## RECOMMENDATION

We recommend that the agency cancel solicitation RQ-1170 and re-solicit its requirements using a SDVOSB set-aside. We recommend that the agency conduct a reasonable market research regarding its requirements under solicitation 179-0306,

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<sup>8</sup> The exemption of the FSS from the requirements of the 2003 Act is set forth at FAR § 19.1404(c). Other exempted procurement programs include Federal Prison Industries, Inc. (§ 19.1404(a)(1)), Javits-Wagner O’Day Act non-profit agencies for the blind or severely disabled (§ 19.1404(a)(2)), orders under indefinite delivery contracts (§ 19.1404(b)), and requirements performed under the Small Business Administration’s 8(a) set-aside program (§ 19.1404 (d)).

<sup>9</sup> We also note that the 2003 statute does not create a set-aside program for VOSBs (as opposed to SDVOSBs), whereas the 2006 statute does. Thus, even if we were to agree with VA concerning the exemption for set asides when making FSS purchases, that exemption would not extend to the VOSB set asides that are also contemplated under the 2006 statute.

and, that it cancel solicitation 179-0306 and re-solicit its requirements using a SDVOSB set-aside if it determines that there are two or more SDVOSB concerns capable of performing the requirements. We also recommend that the agency reimburse the protester the costs of filing and pursuing the protests. 4 C.F.R. § 21.8(d)(1) (2011).

Aldevra's certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision. Id. § 21.8(f)(1).

The protests are sustained.

Lynn H. Gibson  
General Counsel