



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Nationwide Pharmaceutical LLC--Reconsideration

File: B-413489.2; B-413490.2; B-413491.2; B-413492.2; B-413493.2;
B-413494.2; B-413495.2

Date: November 25, 2016

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Brian R. Reed, Esq., Department of Veterans Affairs, for the agency.
Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration arguing that our Office erred in dismissing, as untimely, protest of the terms of a solicitation filed after the closing time for receipt of proposals is denied where protester argues change of law, but failed to file within 10 days of the change in legal requirements.

DECISION

Nationwide Pharmaceutical, LLC (NWP), a service-disabled veteran-owned small business (SDVOSB), of San Antonio, TX, requests reconsideration of our August 18, 2016 decision dismissing its protest of the award of a blanket purchase agreement and issuance of six purchase orders to another offeror by the Department of Veterans Affairs (VA), under request for quotations (RFQ) No. VA69D-16-Q-0351 for pharmacy management and prescription services. NWP contends that our Office erred in dismissing its protest as untimely because of a change in legal requirements that occurred after the ordinary time for filing a protest.

We deny the request for reconsideration.

BACKGROUND

Over a period of years our Office issued a series of decisions sustaining protests based on our finding that the Veterans Benefits, Health Care, and Information Technology Act of 2006 (2006 VA Act), 38 U.S.C. § 8127, required the VA to first consider setting aside a procurement for SDVOSBs, or veteran-owned small businesses (VOSB), before conducting a procurement on an unrestricted basis

under the Federal Supply Schedule (FSS).¹ In response to these decisions, the VA advised in 2012 that it would not follow our recommendations concerning our interpretation of the 2006 VA Act. See GAO Annual Report to Congress for Fiscal Year 2012, at 1, available at: <http://www.gao.gov/products/GAO-13-162SP> (last visited Nov. 22, 2016).

Following the VA's decision not to follow our recommendations, Kingdomware Technologies, Inc., brought suit in the U.S. Court of Federal Claims. On November 27, 2012, the Court issued a decision which disagreed with our Office's interpretation of the 2006 VA Act. Kingdomware Techs., Inc. v. U.S., 107 Fed. Cl. 226 (Fed. Cl., Nov. 27, 2012). The court held that the VA's interpretation of the 2006 VA Act and its regulations, which permit the VA to place orders on the FSS without first considering whether to set aside a requirement for SDVOSB (or VOSB) firms, was entitled to deference. Id. at 34, 35. In light of the VA's decision not to follow our recommendations and the decision of the U.S. Court of Federal Claims, our Office issued a decision holding that we would no longer hear protests that relied solely on the argument that the VA must consider setting aside procurements for SDVOSBs (or VOSBs) before conducting an unrestricted procurement under the FSS, because protesters would be unable to obtain meaningful relief. Kingdomware Techs.--Reconsideration, B-407232.2, Dec. 13, 2012, 2012 CPD ¶ 351. Subsequently, on June 3, 2014, the decision of the Court of Federal Claims in Kingdomware was upheld by the Federal Circuit, albeit over a dissenting opinion that agreed with our Office's reading of the Act. Kingdomware Techs., Inc. v. U.S., 754 F.3d 923 (Fed. Cir., 2014).

On April 15, 2016 NWP filed a timely protest with our Office (the April protest) challenging the VA's decision to issue the instant RFQ via the FSS rather than setting aside the procurement for SDVOSBs. April Protest at 2-3. Specifically, NWP argued that the decision not to set aside the procurement was contrary to the 2006 VA Act, and VA's implementing regulations at 48 C.F.R. § 819.7006. April Protest at 2. On April 19, 2016, the agency requested dismissal of the April protest arguing that our Office indicated that it would no longer consider protests based only on the argument that the VA must consider setting aside procurements for SDVOSBs before conducting a procurement under the FSS. April Request to Dismiss at 1 and Kingdomware Techs.--Reconsideration, supra. In response, NWP withdrew its protest on April 20.

Following the withdrawal of the April protest, the period for submission of quotations closed on June 8, 2016. On June 16, the U.S. Supreme Court issued a decision

¹ E.g., Aldevra, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶ 183; Kingdomware Techs., B-405727, Dec. 19, 2011, 2011 CPD ¶ 283; Aldevra, B-406205, Mar. 14, 2012, 2012 CPD ¶ 112; Crosstown Courier Serv., Inc., B-406262, Mar. 21, 2012, 2012 CPD ¶ 119.

overturning the lower court rulings concerning the interpretation of the 2006 VA Act, holding, among other things, that the requirements of the Act apply to FSS contracts, and therefore a contracting officer must assess whether the procurement should be set aside for SDVOSBs or VOSBs before soliciting via the FSS on an unrestricted basis. Kingdomware Techs., Inc. v. U.S., 136 S. Ct. 1969, 1979 (2016).

On June 22, the VA issued Acquisition Policy Flash 16-16, providing interim internal guidance in response to the Supreme Court's decision. VA Acquisition Policy Flash 16-16 (June 22, 2016). The Policy Flash indicated that, for procurements then in the solicitation or evaluation phase, contracting officers should review the original market research conducted for any procurements not set aside for SDVOSBs, and, if appropriate, change the set-aside. Id. at 3. On July 25, the VA issued Procurement Policy Memorandum 2016-05, which provided additional implementing guidance, but did not meaningfully alter the relevant portions of the policy flash concerning ongoing procurements. See VA Procurement Policy Memorandum (2016-05)--Implementation of the Veterans First Contracting Program as a Result of the U.S. Supreme Court Decision, at 8-9 (July 25, 2016).

On July 29, the agency awarded a blanket purchase agreement under the RFQ, and issued six orders under the blanket purchase agreement. NWP filed a protest of that award on August 1 (the August protest). NWP's August protest argued essentially the same grounds as the April protest--i.e., that the agency was required to assess whether the procurement should be set aside for SDVOSB's or VOSB's before soliciting on the FSS. August Protest at 1-2. The agency moved to dismiss on August 2, noting that the protester's argument concerned alleged improprieties in the solicitation and was therefore untimely, and that NWP was not an interested party. August Motion to Dismiss at 3. In comments to the motion to dismiss, NWP argued that the intervening Supreme Court decision and agency guidance represented a significant change in the legal landscape, and that the VA's failure to comply with the new requirements was not apparent prior to August 1. August Protester Comments on Motion to Dismiss at 2.

We dismissed the August protest as untimely because it was a protest of improprieties in the solicitation not made before the initial closing time for submission of proposals. We did not address NWP's arguments concerning the change in legal requirements following the Supreme Court decision.

DISCUSSION

The protester now repeats its prior argument concerning the change in legal requirements, and argues that it had no way of knowing its grounds for protest prior to the award of the blanket purchase agreement on July 29. Request for Reconsideration at 2. NWP notes that it withdrew its April protest, in response to the agency's dismissal request, on the basis that our Office previously indicated that

it would no longer consider protests based only on the argument that the VA must consider setting aside procurements for SDVOSBs or VOSBs before conducting a procurement under the FSS. Request for Reconsideration at 1. NWP goes on to argue that after closing, but before award, the Supreme Court addressed this issue clarifying that the VA's reading of the statute in question was incorrect, and that the VA subsequently issued internal guidance indicating that they would re-examine market research for ongoing procurements in the evaluation phase. See Kingdomware Techs., Inc. v. U.S., 136 S. Ct. 1969, and VA Policy Flash 16-16. NWP contends that this change in legal requirements and new agency guidance represented a change in requirements, and that it had no way of knowing that the VA would not follow its internal guidance before the award was made on July 29. Request for Reconsideration at 2.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered. 4 C.F.R. § 21.14(a) (2013). NWP's request here does not allege an error in law that would provide a basis for us to reconsider our prior decision.

Law vs. Guidance

First, we address a threshold question concerning the significance of the VA's policy flash and later policy memorandum. NWP argues that the policy memorandum established a new requirement on July 25,² of which the protester could not have had knowledge prior to the time for closing of the solicitation. Request for Reconsideration at 2. This allegation, however, does not establish a valid basis for protest with our Office.

Under the Competition in Contracting Act of 1984, our Office is authorized to decide bid protests "concerning an alleged violation of a procurement statute or regulation." 31 U.S.C. §§ 3552, 3553(a). We have consistently held that protests relying on internal agency policy or guidance, rather than statute or regulation, do not establish a valid basis for protest. See, e.g., Triad Logistics Servs. Corp., B-403726, Nov. 24, 2010, 2010 CPD ¶ 279 at 2-3. The cited VA policy memorandum is internal agency policy guidance, and therefore alleged violations of that memorandum are not a valid basis for protest. Any valid basis for protest in this case would have to be founded on the argument that the Supreme Court's decision concerning the 2006 VA Act effected a change in legal requirements for ongoing procurements.

² We note in passing that the July 25 policy memorandum, in relevant part, merely restated an earlier policy flash publicly issued over a month prior on June 22. See VA Policy Flash 16-16 (June 22, 2016).

However, the issue of whether the Supreme Court's decision actually represented a change in the legal requirements for an ongoing procurement is not clear. As noted in our recent decision in Aldevra--Reconsideration, the court indicated that its decision was prospective, saying that it would govern "the [VA]'s future contracting." See Aldevra--Reconsideration, B-411752.2, Oct. 5, 2016, 2016 CPD 284, citing Kingdomware Techs., Inc. v. U.S., 136 S. Ct. 1969 at 1975. The court did not expressly indicate whether ongoing procurements were included in the prospective scope of their decision. While VA's internal policies provide guidance concerning ongoing procurements, it is unclear if this approach was required by the Supreme Court's decision, or rather represented discretionary action on the part of the agency. We do not reach the issue of whether the Supreme Court decision created an obligation concerning ongoing procurements because, as explained below, it is not necessary to reach that issue to resolve the issues presented.

Timeliness

Underlying our timeliness rules regarding solicitation improprieties is the principle that challenges which go to the heart of the underlying ground rules by which a competition is conducted, should be resolved as early as practicable during the solicitation process, but certainly in advance of an award decision if possible, not afterwards. Caddell Construction, Co., Inc., B-401281, June 23, 2009, 2009 CPD ¶ 130 at 3.

We have not previously addressed the interplay of our timeliness rules with changes in legal requirements that did not specify their effect on ongoing procurements, but our broader body of decisions regarding timeliness are instructive. In general, for newly discovered information or changes that occur after the time for closing, we apply the timeliness rules at 4 C.F.R. § 21.2(a)(2)-(3): protests shall be filed not later than 10 days after the basis of protest is known or should have been known, or within 10 days of learning of initial adverse agency action when there is a timely-filed agency protest. For example, in cases where the agency's requirements changed after the time for submission of proposals, we have found later filed protests to be timely only if filed within 10 days of discovery of the change of requirements. See, e.g., Armorworks Enterprises, LLC, B-400394, B-400394.2, Sept. 23, 2008, 2008 CPD ¶ 176 at 5-6 and LBM, Inc., B-290682, Sept. 18, 2002, 2002 CPD ¶ 157 at 6-7. Similarly, after the trial of a senior Air Force procurement official led to revelations about improper procurement practices long after the normal time for filing, we found those protests timely when filed within 10 days of discovery, or 10 days of the denial of an agency protest filed following the discovery. See, e.g., Lockheed Martin Corp., B-295402, Feb. 18, 2005, 2005 CPD ¶ 24 at 7-8.

Assuming, for the sake of argument, that protester's reading of the Supreme Court decision is correct,³ and the decision effected a change in legal requirements applicable to ongoing procurements, this protest was still untimely. The protester argues that there has been a change in the law, but did not file a protest with the agency or with our Office within 10 days of that change. Instead this protest was filed over a month following the Court's decision, after contract award. Here, the protester argues that there was no way it could have known that the agency would fail to set aside the procurement consistent with the court's decision and the agency's own guidance⁴ until the notice of award was published on July 29, 2016. However, Nationwide previously protested the agency's decision not to set this requirement aside for SDVOSBs on April 15. Following that protest, protester was aware of: (1) the agency's requirement; (2) the fact that the requirement had not been set aside for SDVOSBs; and (3) the fact that no award had yet been made. While we have held that a protester need not protest until it has knowledge that the agency is intending action that is believed to be incorrect or inimical to the protester's interests, that is not this case. See LBM, Inc., supra at 7. The inappropriate agency action here complained of (the failure to set aside the procurement) had already occurred at the time of the Supreme Court decision, and the protester was aware of it. If, as protester suggests, the Supreme Court's decision created a legal obligation for the agency to take action on solicitations currently in progress, the protester had reason to know of this basis for protest immediately following the issuance of the Supreme Court's decision on June 16, and for this protest to be timely it should have been filed with our Office within ten days of that decision.

We might apply a different calculus had the agency advised the protester that it would revisit this specific procurement, rather than making a general statement in internal guidance, as we have generally held a protester may reasonably rely on the agency's representations with respect to specific procurements. See, e.g., N&N Travel & Tours, Inc., et al., B-285164.2, B-285164.3, Aug. 31, 2000, 2000 CPD ¶ 146 at 6-7 (holding that untimeliness is excused when the protester failed to timely file a protest against a broad ID/IQ contract, when the agency had given protester reason to believe that the specific services at issue would be procured through a separate forthcoming contract). Here, however, the agency merely issued guidance indicating an intention to revisit certain issues in ongoing procurements in general, but the guidance did not make reference to any specific procurements and, as

³ If the protester's reading is incorrect, and the Supreme Court's decision had no effect on ongoing procurements, the protest would be without a legal basis, and our original decision need not be disturbed.

⁴ As noted above, it is immaterial whether or when subsequent agency internal guidance was issued, as issues regarding compliance with internal agency guidance do not provide a basis for protest.

noted above, the portion of the procurement in dispute here had already been concluded at that time.

In sum, where a protester seeks to file a protest of a procurement on the basis that legal requirements applicable to the terms of the solicitation changed after the ordinary time for filing, that protest must be filed within 10 days of the change in legal requirements.

The request for reconsideration is denied.

Susan A. Poling
General Counsel