



## Decision

**Matter of:** Aldevra--Reconsideration

**File:** B-411752.2

**Date:** October 5, 2016

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Rodney Marshall, Aldevra, for the protester.  
Capt. Matthew A. Freeman, and Scott N. Flesch, Esq., Department of the Army,  
and John W. Klein, Esq., and Sam Q. Le, Esq., Small Business Administration,  
for the agencies.

Matthew T. Crosby, Esq., and Christina Sklarew, Esq., Office of the General  
Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Request for reconsideration of a decision denying a protest is dismissed where the request is based on the holding in a United States Supreme Court decision issued eight months after the protest decision and the Supreme Court decision establishes that the holding is prospective only in effect.

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### DECISION

Aldevra, of Portage, Michigan, requests reconsideration of our decision in Aldevra, B-411752, Oct. 16, 2015, 2015 CPD ¶ 339, in which we denied the firm's protest of the terms of request for quotations No. 999313, issued by the Department of the Army, National Guard Bureau, Kansas Air National Guard, for an ice machine/water dispenser.

We dismiss the request.

### BACKGROUND

The agency issued the solicitation for the ice machine/water dispenser on June 29, 2015, pursuant to Federal Supply Schedule (FSS) procedures set forth in Federal Acquisition Regulation (FAR) subpart 8.4. The procurement was valued at approximately \$4300. The solicitation was not issued as a small business set-aside. Before the solicitation closed, Aldevra, which holds an FSS contract, filed a protest with our Office arguing that the agency's decision not to issue the solicitation as a set-aside was improper.

Aldevra based its argument on a provision within section 644(j) of the Small Business Act, 15 U.S.C. § 644(j). This provision provides as follows:

Each contract for the purchase of goods and services that has an anticipated value greater than \$2,500 but not greater than \$100,000 shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the goods or services being purchased.

15 U.S.C. § 644(j)(1).<sup>1</sup> Aldevra argued that because the procurement was valued between \$3,000 and \$150,000, section 644(j) required the agency to issue the solicitation as a set-aside, unless market research showed that competitive offers from two or more small business concerns could not reasonably be expected.<sup>2</sup>

Our Office denied Aldevra's protest, finding that section 644(j) did not require the solicitation to be issued as a set-aside because a separate section of the Small Business Act--section 644(r)--together with the regulations that implement that section, demonstrate that an agency's use of set-aside procedures for orders under FSS contracts is discretionary, rather than mandatory. More specifically, our decision described how, pursuant to section 644(r) of the Small Business Act, various sections of the FAR were revised, including FAR subpart 8.4, which establishes procedures for placing orders under FSS contracts. Our decision further described how FAR § 8.405-5(a)(1)(i) was revised to expressly provide that the socio-economic programs under FAR part 19 are not mandatory when agencies place orders under FSS contracts. Finally, our decision described how revisions that SBA made to its regulations also show that contracting officers are not required to set aside orders under multiple-award contracts (including FSS contracts), but that they have the discretion to do so. See 13 C.F.R. § 125.2(e). For these reasons, we denied Aldevra's protest.

On June 16, 2016--approximately eight months after our decision in Aldevra--the United States Supreme Court issued its decision in Kingdomware Technologies v. United States, 136 S. Ct. 1969 (2016). The issue before the Court was whether section 8127(d) of the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128 (hereinafter, the VA Act), requires the

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<sup>1</sup> When the solicitation was issued, the lower dollar threshold was \$3,000 and the upper threshold was \$150,000. As of October 1, 2015, the lower threshold was adjusted further upward to \$3,500. 80 Fed. Reg. 38294 (July 2, 2015).

<sup>2</sup> In both the protest and the request for reconsideration, the Small Business Administration (SBA) supported Aldevra's position.

Department of Veterans Affairs (VA) to set aside contracts for veteran-owned small business concerns when there is a reasonable expectation that at least two such concerns will submit offers at reasonable prices. Kingdomware, 136 S. Ct. at 1973. As relevant here, in assessing its jurisdiction to hear the case, the Court described how the VA procurement at issue was an FSS order that, at the time the case reached the Court, had been fully performed. Id. at 1975-76. The Court held that although such a case generally would be moot, the Court nevertheless had jurisdiction because the same legal issue would likely arise in future controversies between the same parties. Id. at 1975. While the Court took jurisdiction, it advised that its “interpretation of [the VA Act]’s requirements in this case will govern the [VA]’s future contracting.” Id. (emphasis added).

With regard to the merits of the case, the Court held that the set-aside procedure in section 8127(d) of the VA Act is mandatory for VA procurements.<sup>3</sup> Kingdomware, 136 S. Ct. at 1976. The court reached this conclusion largely because section 8127(d) uses the word “shall,” rather than “may.” Id. at 1976-77. The Court also held that FSS orders are not excepted from section 8127(d)’s mandatory set-aside procedures. Id. at 1978.

On June 26, Aldevra filed its request for reconsideration with our Office. In its request, Aldevra argues that the Supreme Court’s decision regarding the application of section 8127(d) of the VA Act to VA procurements compels our Office to revisit and reverse our decision regarding the application of section 644(j) of the Small Business Act to the Army procurement for the ice machine/water dispenser. Request for Reconsideration at 1-2. The firm advances two arguments as to why.

First, Aldevra argues that because the Court reached the conclusion that the set-aside procedure in the VA Act is mandatory for the VA based largely on the statute’s use of the word “shall” (rather than “may”), our Office should conclude that section 644(j) of the Small Business Act—which also uses the word “shall”—imposes a set-aside requirement for all procurements—including FSS orders—valued between \$3500 and \$150,000.<sup>4</sup> See Request for Reconsideration at 3-4. Second, Aldevra argues that because the Court also reached the conclusion that FSS orders

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<sup>3</sup> Our Office reached the same conclusion regarding the meaning of section 8127(d) in numerous protests that preceded Kingdomware’s appeal to the Supreme Court. See, 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.

<sup>4</sup> As shown above, section 644(j) of the Small Business Act states that contracts of a designated value “shall be reserved exclusively for small business concerns” unless the contracting officer determines there is no reasonable expectation that at least two small business concerns will submit offers at reasonable prices.

are not excepted from the set-aside procedures of the VA Act, our Office should conclude that FSS orders are encompassed in the set-aside procedures of section 644(j) of the Small Business Act. See Request for Reconsideration at 4.

In response, the Army asserts that Aldevra's request for reconsideration should be dismissed because the Supreme Court's ruling in Kingdomware was not retroactive and our decision in Aldevra preceded the Court's decision. Agency Response to Request for Reconsideration at 2. The Army also states that after Aldevra's protest was resolved, it took delivery of the needed ice machine/water dispenser and that there is "no outstanding work to be done, no additional items to be delivered, and no additional payments to be made" in connection with the procurement. Id. at 4.

Our Bid Protest Regulations provide that to obtain reconsideration, the requesting party must set forth 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) (2016). Our Regulations further provide that we will summarily dismiss any request for reconsideration that fails to state a valid basis for reconsideration. Id. § 21.14(c). For the reasons that follow, we find that Aldevra has not provided a valid basis for reconsideration.

As outlined above, after analyzing the question of jurisdiction in Kingdomware, the Supreme Court expressly stated that its interpretation of the VA Act would govern "future contracting" of the VA. Thus, the Court conveyed that its ruling would have only a prospective, rather than retroactive, effect. As also outlined above, our decision in Aldevra's protest preceded the Supreme Court's decision by approximately eight months. Accordingly, even if we were to accept Aldevra's position that the Court's interpretation of the VA Act has bearing on our interpretation of the Small Business Act as described in our decision in Aldevra's protest, the Court's interpretation, by the express language of its decision, is prospective in nature, and therefore inapplicable to the procurement at issue in Aldevra's protest.

The request for reconsideration is dismissed.

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General Counsel