



Decision

Matter of: Cross & Company, LLC

File: B-417971

Date: December 20, 2019

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DIGEST

Protest challenging terms of solicitation issued by the General Services Administration (GSA) that did not consider the requirements of the Veterans Benefits, Health Care, and Information Technology Act of 2006, is denied where GSA is acquiring a lease of real property, and not goods or services, to be used by the Department of Veterans Affairs.

DECISION

Cross & Company, LLC, a veteran-owned small business (VOSB) concern of Frederick, Maryland, protests the terms of request for lease proposals (RLP) No. 8PA2226, issued by the General Services Administration (GSA) for the lease of space to be used as a community-based outpatient clinic by the Department of Veterans Affairs (VA) in the Pittsburgh, Pennsylvania area. The protester asserts that the solicitation violates the Veterans Benefits, Health Care, and Information Technology Act of 2006 (VBA) by improperly failing to consider setting aside the lease for service-disabled veteran-owned small businesses (SDVOSBs) or VOSBs.

We deny the protest.

BACKGROUND

GSA has authority to enter into lease agreements with entities “for the accommodation of a federal agency in a building (or improvement) which is in existence or being erected by the lessor to accommodate the federal agency.” 40 U.S.C. § 585(a). Pursuant to this statutory authority, GSA controls over 188 million rentable square feet of leased

space through approximately 8,100 individual leases. GSA Memorandum of Law (MOL) at 2.

In February 2019, prior to issuing the RLP at issue here, GSA entered into an occupancy agreement with the VA. Agency Report (AR), Exh. 2, Occupancy Agreement, at 1. The occupancy agreement set forth a description of the rental space needed by the VA in Pittsburgh, PA; responsibilities of each party; and estimated rent to be paid by the VA to GSA. Id.; see also 41 C.F.R. § 102-85.25 (purpose of occupancy agreement is to capture business terms “to which GSA and a customer agency agree concerning individual space assignments”).

On June 5, GSA issued the RLP seeking offerors to “propose space for lease to be used as a Community Based Outpatient Clinic (CBOC) by the [VA]” under a 20-year lease in the Pittsburgh, Pennsylvania area. AR, Exh. 3, RLP, at 1. The RLP requires that the building provide between 61,486 and 64,159 square feet of space, configured to meet certain agency-specific requirements as set out in the RLP. Id. at 5-8.

The RLP sets out a two-phase, design-build selection procedure where the agency will first evaluate offerors on their experience and past performance on similar projects; project staffing; and design philosophy (methodology) and approach. Id. at 22-23. GSA will select up to five offerors with the best rating in phase 1 to proceed to phase 2. In phase 2, the selected offerors will submit full technical and price proposals, including identifying the proposed building or site, and the agency will evaluate proposals based on the quality of their building and design concept, quality of site location and configuration, and project management plan. Id. The award will be made on a best-value tradeoff basis considering price and the technical factors. Id. at 22. The RLP also specified that the combination of non-price factors is approximately equal in importance to price. Id.

On September 9, GSA issued an amendment to the solicitation that provided specifications for proposal submissions and responded to questions from prospective offerors. AR, Exh. 4, RLP amend. 1. As relevant here, the amendment included the following question and response:

Question

As the statutory requirements of the Rule of Two, as explained in the Supreme Court’s Kingdomware decision, apply to this procurement, what is or will be the process for assuring compliance with the statutory mandate?

Response

This is a GSA procurement of a leasehold interest in real property, therefore the Rule of Two does not apply.

Id. at 2.

Proposals were due by September 16, 2019. Cross filed this protest with our Office on September 13.

DISCUSSION

Cross protests that the VA, through GSA, is improperly seeking to procure a leased space for its outpatient clinic without considering the requirements of the VBA, 38 U.S.C. §§ 8127-8128. Protest at 3. The protester argues that the VBA imposes a requirement for the VA--and for GSA, when conducting this procurement on behalf of the VA--to determine whether there are two or more SDVOSBs or VOSBs that can meet the agency's need for leased space. Id. at 4.

The requirement for the VA to set aside acquisitions for VOSBs or SDVOSBs, often referred to as the VA's rule of two, provides, in relevant part, as follows:

(d) Use of Restricted Competition. . . . for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans or small business concerns owned and controlled by veterans with service-connected disabilities if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans or small business concerns owned and controlled by veterans with service-connected disabilities will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. § 8127(d). The Supreme Court (as well as our Office) has interpreted this statutory provision as requiring the VA to determine: (1) whether there is a reasonable expectation that at least two eligible concerns will submit proposals responsive to the agency's requirements; and (2) whether award can be made at a fair and reasonable price. Kingdomware Tech., Inc. v. United States, 136 S. Ct. 1969, 1976 (2016); see also Aldevra, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶ 183 at 3.

Our Office and the courts have further found that requirements of another provision of the VBA apply where the VA enters into an arrangement with another federal governmental entity to acquire goods or services on behalf of the VA. Veterans4You, Inc., B-417340, B-417340.2, June 3, 2019, 2019 CPD ¶ 207 at 5-6; see also Veterans4You, Inc. v. United States, 145 Fed. Cl. 181, 192 (2019). That provision provides as follows:

Applicability of Requirements to Contracts.--(1) If after December 31, 2008, the Secretary enters into a contract, memorandum of understanding, agreement, or other arrangement with any governmental entity to acquire goods or services, the Secretary shall include in such contract, memorandum, agreement, or other arrangement a requirement

that the entity will comply, to the maximum extent feasible, with the provisions of this section in acquiring such goods or services.

38 U.S.C. § 8127(i).

GSA first argues that the rule of two does not apply to this procurement because 38 U.S.C. § 8127(d) applies only to contracts awarded by a VA contracting officer, whereas this procurement is conducted by GSA, through a GSA lease contracting officer, and utilizing GSA's authority pursuant to 40 U.S.C. § 585. Second, GSA argues that 38 U.S.C. § 8127(i) applies only to the acquisition of goods and services, which does not include leasehold interests.¹ MOL at 3-10.

The protester argues that the statutory intent of 38 U.S.C. § 8127(i) is to extend the mandatory requirements of 38 U.S.C. § 8127(d) to instances where another governmental entity is conducting the procurement on behalf of the VA. Comments at 3-4. The protester argues that GSA, by virtue of conducting the procurement of the lease for the VA's use, must comply with the rule of two to the maximum extent feasible. Id. The protester further argues that subsection 8127(i) applies to this procurement because: (1) real property leases are considered "goods" under certain state laws; and (2) this solicitation includes a procurement of services insofar as it includes the design and construction of the VA's outpatient clinic. Id. at 4-7. Under Cross's interpretation, GSA must comply with the rule of two to the maximum extent feasible and determine whether two or more VOSBs or SDVOSBs are capable of meeting the requirements at a fair and reasonable price. Id.

Our analysis here must first begin with the interpretation of the statute. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with 'the language of the statute.'"). In construing the statute, the first step is "to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 450 (2002) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)). In this regard, we "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175 (2009). If the

¹ GSA also argues that it is not conducting the acquisition on behalf of the VA, but for the federal government in general using its unique authority under 40 U.S.C. §§ 584 and 585. MOL at 10. In this regard, GSA contends that while the current plan is for the VA to occupy the leased space, GSA may reassign the space to a different agency at any time and GSA is and would remain the only agency legally obligated under the terms of the lease. Id.; GSA Supp. Response, Dec. 9, 2019, at 2-4. GSA explains that the RLP includes General Services Acquisition Regulations (GSAR) clause 552.270-25, Substitution of Tenant Agency, which states that the "Government may, at any time and from time to time, substitute any Government agency or agencies for the Government agency or agencies, if any, named in the lease." RLP at 229.

statutory language is clear and unambiguous, the inquiry ends with the plain meaning. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

Here, we conclude that the mandatory preference in 38 U.S.C. § 8127(d) does not apply to this procurement.² While the plain language of the statute establishes a mandatory preference for VOSBs and SDVOSBs, it also limits the application of the mandatory preference in subsection 8127(d) to when the VA conducts the procurement. 38 U.S.C. § 8127(d) (“a contracting officer of the Department [of VA] shall award contracts on the basis of competition restricted to [VOSBs or SDVOSBs]”); see also Veterans4You, Inc., 145 Fed. Cl. at 192 (“[T]he text of the VBA also makes clear that this preference applies only when the VA Secretary and the VA Contracting Officer are conducting a procurement on behalf of the agency.”). In contrast, the conduct of a procurement by another governmental entity on behalf of the VA is addressed in subsection 8127(i). 38 U.S.C. § 8127(i)(1). This subsection requires the VA to request that a governmental entity acquiring goods or services on its behalf comply with the rule of two to the maximum extent feasible. Id.; see Veterans4You, Inc., 145 Fed. Cl. at 192.

We also conclude that 38 U.S.C. § 8127(i) does not apply to this procurement because GSA is not acquiring goods or services, but is acquiring a leasehold in real property. In interpreting statutes, a presumption exists that each word Congress uses in a statute is there for a reason and one must “give effect, if possible, to every clause and word of a statute.” Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652, 1659 (2017) (quoting Williams v. Taylor, 529 U.S. 362, 404 (2000)). Therefore, when different words are used in the same statutory provision, they are presumed to have different meanings. See Russello v. United States, 464 U.S. 16, 23 (1983).

GSA argues that § 8127(d) of the VBA states that the rule of two applies when the VA “award[s] contracts,” while § 8127(i) states that the rule of two applies (to the maximum extent feasible) when the VA, through another governmental entity, “acquire[s] goods or services.” GSA Supp. Response, Dec. 9, 2019, at 4-5. While the protester asks us essentially to treat “contracts” in § 8127(d) as no different than the “acqui[sition of]

² Our Office twice requested that the VA provide its views on the interpretation of 38 U.S.C. § 8127. The VA’s first response was as follows:

VA supports Veterans. Under 38 U.S.C. § 8127(d), VA applies the VA Rule of Two in its own procurements. However, because GSA, not VA is conducting the lease procurement in this specific case, VA defers to GSA on how to apply the Rule of Two to its procurements.

VA Comments at 1. When our Office requested that the VA clarify its position, the VA further stated that it “acknowledges, as noted in the underlying solicitation, that this procurement is for the acquisition of a leasehold interest in real property,” and that it “defers to GSA as to whether GSA is required to apply the VA Rule of Two under 38 U.S.C. § 8127(i) to any particular procurement.” VA Clarification at 1.

goods or services” in § 8127(i), we must presume that Congress used two different terms with the intent for them to have different meanings. Therefore, we find that it is reasonable for GSA to interpret the statutory language in § 8127(i) to limit the application of the rule of two specifically to the acquisition of goods or services, when another governmental entity is conducting the procurement.

Because the VBA does not define the terms “goods” or “services,” we must turn to ordinary definitions of these terms in interpreting this provision. See 38 U.S.C. § 101; Perrin v. United States, 444 U.S. 37, 42 (1979) (“unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning”); Wisconsin Central Ltd. V. United States, 138 S. Ct. 2067, 2070 (2018). The protester argues that real property leases can be considered “goods,” citing a discussion of the term by a federal district court. Comments at 4 (citing Montalvo v. Bank of Am. Corp., 864 F. Supp. 2d 567, 595 (W.D. Tex. 2012)). We note, however, that the state law discussed in Montalvo, unlike the VBA, specifically defined the term “goods” to include “real property purchased or leased for use.” Montalvo, 864 F.Supp.2d at 595.

GSA relies on dictionary definitions of the terms “goods” and “services” at the time the VBA was enacted to conclude that a real property lease is not a good or a service as it is not “produced or manufactured, it does not involve personal property, and it does not qualify as labor, skill, or advice.”³ MOL at 8. GSA also notes that the Federal Acquisition Regulation (FAR), by its terms, excludes real property leases from the acquisition of supplies and services governed by the FAR. Id. (citing The Argos Group, LLC, B-406040, Jan. 24, 2012, 2012 CPD ¶ 32 at 2); see FAR §§ 1.104 and 4.601.

The protester contends that we should follow the analysis in The Argos Group, LLC, where our Office found that the mandatory price evaluation preference provisions of the Historically Underutilized Business Zone Act (HUBZone Act) applied to the procurement of leasehold interests, notwithstanding the inapplicability of the FAR. Protest at 4-5. We find, however, that the language of the statute at issue in that protest is distinguishable from the VBA provision at issue.

In The Argos Group, LLC, we concluded that the HUBZone Act, on its face, does not limit the type of “contract” to which the price evaluation preference applies. Argos Group, LLC, supra, at 4 (citing 15 U.S.C. § 657a). Therefore, we found that the price evaluation preference of the HUBZone Act applies broadly to all federal contracts that involve full and open competition, which includes real property leases. Id. In contrast,

³ GSA cites to a dictionary definition of a “good” as “something manufactured or produced for sale” and “service” as “useful labor that does not produce a tangible commodity.” MOL at 8 n.5 (quoting Merriam-Webster’s Collegiate Dictionary (11th ed. 2003)). GSA also notes that Black’s Law Dictionary defined “goods” as “[t]angible or movable personal property other than money” and “service” as “intangible commodity in the form of human effort, such as labor, skill, or advice.” Id. (quoting Black’s Law Dictionary (8th ed. 2004)).

the text of subsection 8127(i) of the VBA is limited to the acquisition of goods or services and not all federal contracts. 38 U.S.C. § 8127(i). We find reasonable GSA's conclusion that § 8127(i), based on the ordinary meaning of the terms goods and services, excludes real property leases.

Finally, the protester argues that, even if the application of § 8127(i) is limited to the acquisition of goods and services, this procurement falls within that limitation because it includes a "procurement of services designed to yield a manufactured product--a very specially designed and purpose-built VA [CBOC]." Comments at 4. The protester bases its argument on the RLP provision identifying this procurement as being "conducted using the Two Phase Design Build Selection Procedures," where the first phase requires the agency to evaluate offerors' experience, past performance, staffing, and design philosophy and approach, solely with respect to the design-build portion of the solicitation, and the second phase also includes "the evaluation of both services and real estate matters." Comments at 4-5. The protester also asserts that GSA's own regulations and policy requires that GSA, when acquiring leasehold interests using the two-phase design-build process, apply FAR part 36.3 on construction and architect-engineer contract provisions. Comments on Supp. Response, Dec. 11, 2019, at 2-3. Thus, the protester argues, the inclusion of such construction service makes this procurement one for construction, which is an acquisition of goods and services under 38 U.S.C. § 8127(i). Comments on Supp. Response, Dec. 13, 2019, at 2-3.

GSA argues that the protester confuses the procedure GSA is using in selecting the awardee with the contract that will be awarded as a result. In this regard, GSA points out that its regulations specifically permit GSA to use the design-build selection process in its acquisition of real property leases. GSA Supp. Response, Dec. 12, 2019, at 1-2; see GSAR § 570.105-2 ("The contracting officer may use the two-phase design-build selection procedures . . . for lease construction projects . . . [when] the lease will involve the design and construction of a building, facility, or work for lease to the Government."); see also GSAR § 570.305(a) ("These procedures apply to acquisitions of leasehold interests if the contracting officer uses the two-phase design-build selection procedures authorized by 570.105-2.").

GSA also notes that nearly every procurement of a lease for a federal agency requires a certain amount of design, architectural, and construction services to make the space suitable for government occupancy. GSA Supp. Response, Dec. 12, 2019, at 2 ("It is very rare for a private sector lessor to have fully built-out, ready-to-lease space for the Government without having to separately and independently obtain construction and architectural services for itself in order to prepare the space for Government occupancy."). GSA asserts that this does not turn the acquisition into one for construction.

Here, the contract to be awarded is for a 20-year lease of space to be occupied by the federal government, with the majority of the cost to the government comprised of real property rental by square footage. See RLP at 5-8. Although the RLP requires the potential lessor to perform certain design and construction services to make the space

suitable for a specialized use by the occupying federal agency, we do not find that this requirement subsumes the primary purpose of the procurement of a real property lease. See Warrior Service Co., B-417612, Aug. 16, 2019, 2019 CPD ¶ 296 (finding agency's classification of solicitation as one for supplies reasonable since primary purpose was the procurement of mattresses and remaining services were incidental). We find reasonable the agency's explanation that the primary purpose of the acquisition here is for a leasehold in real property.

In sum, as the protester's arguments are not borne out by the plain meaning of unambiguous statutory language, we find that the VBA is not applicable to GSA's procurement of real property leases here.

The protest is denied.

Thomas H. Armstrong
General Counsel