



GAO

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United States Government Accountability Office
Washington, DC 20548

B-158766

November 13, 2012

Congressional Committees:

This letter responds to the requirements of the Competition in Contracting Act of 1984, 31 U.S.C. § 3554(e)(2) (2006), that the Comptroller General report to Congress each instance in which a federal agency did not fully implement a recommendation made by our Office in connection with a bid protest decided the prior fiscal year. By letter dated March 30, 2012, a copy of which is enclosed, we reported three such occurrences involving the Department of Veterans Affairs (VA), Kingdomware Technologies, B-405727, Dec. 19, 2011, 2011 CPD ¶ 283, Aldevra, B-406205, Mar. 14, 2012, 2012 CPD ¶ 112, and Crosstown Courier Service, Inc., B-406262, Mar. 21, 2012, 2012 CPD ¶ 119. As explained in the March 30 letter, we sustained the protests finding that the VA's use of General Services Administration Federal Supply Schedule (FSS) procedures, without first considering whether two or more service-disabled veteran-owned small business (SDVOSB) or veteran-owned small business (VOSB) concerns were capable of meeting the agency's requirements at a reasonable price, was contrary to the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128 (2006).

Subsequent to the three occurrences noted above, 15 protests were filed by Aldevra and Kingdomware Technologies, raising the same issue reported in our March 30 letter. We sustained these protests as well, essentially repeating our analysis from our prior decisions addressing the issue. In each instance, the VA has declined to implement our recommendation. We have included an attachment identifying our decisions resolving these 15 additional protests, all of which are publicly available on GAO's website. If we sustain similar protests in fiscal year 2013, we will notify the Congress at the end of the year. We also understand that the issue raised by these cases is currently pending at the U.S. Court of Federal Claims.

During the 2012 fiscal year, we received 2,339 protests, 47 cost claims, and 89 requests for reconsideration, for a total of 2,475 cases. Of the 2,339 protests filed, 209 are attributable to GAO's bid protest jurisdiction over task orders. We closed 2,495 cases during the fiscal year: 2371 protests, 40 cost claims, and 84 requests for reconsideration.

Enclosed for your information is a chart comparing the bid protest activity for fiscal years 2008-2012.



Lynn H. Gibson
General Counsel

Enclosures

The Honorable Daniel K. Inouye
Chairman
The Honorable Thad Cochran
Vice Chairman
Committee on Appropriations
United States Senate

The Honorable Carl Levin
Chairman
The Honorable John McCain
Ranking Member
Committee on Armed Services
United States Senate

The Honorable Joseph I. Lieberman
Chairman
The Honorable Susan M. Collins
Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable Mary L. Landrieu
Chair
The Honorable Olympia J. Snowe
Ranking Member
Committee on Small Business and Entrepreneurship
United States Senate

The Honorable Harold Rogers
Chairman
The Honorable Norman D. Dicks
Ranking Member
Committee on Appropriations
House of Representatives

The Honorable Howard P. "Buck" McKeon
Chairman
The Honorable Adam Smith
Ranking Member
Committee on Armed Services
House of Representatives

The Honorable Darrell E. Issa
Chairman
The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and Government Reform
House of Representatives

The Honorable Sam Graves
Chairman
The Honorable Nydia M. Velázquez
Ranking Member
Committee on Small Business
House of Representatives

Cases included in our March 30, 2012 report:

- * Kingdomware Technologies, B-405727, Dec. 19, 2011, 2011 CPD ¶ 283.
- * Aldevra, B-406205, Mar. 14, 2012, 2012 CPD ¶ 112.
- * Crosstown Courier Service, Inc., B-406262, Mar. 21, 2012, 2012 CPD ¶ 119.

Subsequent cases:

- * Aldevra, B-406331, B-406391, Apr. 20, 2012, 2012 CPD ¶ 144.
- * Kingdomware Technologies, B-406507, May 30, 2012, 2012 CPD ¶ 165.
- * Aldevra, B-406608, B-406654, B-406655, B-406656, July 13, 2012, 2012 CPD ¶ 207.
- * Aldevra, B-406774, B-406857, B-406892, B-406912, B-406913, B-406927, B-406928, B-406942, Aug. 21, 2012, 2012 CPD ¶ 240.

Bid Protest Statistics for Fiscal Years 2008-2012

	FY 2012	FY 2011	FY 2010	FY 2009	FY 2008
Cases Filed ¹	2,475 ² (up 5% ³)	2,353 (up 2%)	2,299 (up 16%)	1,989 (up 20%)	1,652 (up 17%)
Cases Closed	2,495	2,292	2,226	1,920	1,582
Merit (Sustain + Deny) Decisions	570	417	441	315	291
Number of Sustains	106	67	82	57	60
Sustain Rate	18.6%	16%	19%	18%	21%
Effectiveness Rate ⁴	42%	42%	42%	45%	42%
ADR ⁵ (cases used)	106	140	159	149	78
ADR Success Rate ⁶	80%	82%	80%	93%	78%
Hearings ⁷	6.17% (56 cases)	8% (46 cases)	10% (61 cases)	12% (65 cases)	6% (32 cases)

¹ All entries in this chart are counted in terms of the docket numbers ("B" numbers) assigned by our Office, not the number of procurements challenged. Where a protester files a supplemental protest or multiple parties protest the same procurement action, multiple iterations of the same "B" number are assigned (i.e., .2, .3). Each of these numbers is deemed a separate case for purposes of this chart. Cases include protests, cost claims, and requests for reconsideration.

² Of the 2,475 cases filed in FY 2012, 209 are attributable to GAO's bid protest jurisdiction over task or delivery orders placed under indefinite-delivery/indefinite-quantity contracts.

³ From the prior fiscal year.

⁴ Based on a protester obtaining some form of relief from the agency, as reported to GAO, either as a result of voluntary agency corrective action or our Office sustaining the protest. This figure is a percentage of all protests closed this fiscal year.

⁵ Alternative Dispute Resolution.

⁶ Percentage of cases resolved without a formal GAO decision after ADR.

⁷ Percentage of fully developed cases in which GAO conducted a hearing; not all fully-developed cases result in a merit decision.



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United States Government Accountability Office
Washington, DC 20548

B-405727

March 30, 2012

Congressional Committees

Subject: Kingdomware Technologies, B-405727, Dec. 19, 2011, 2011 CPD ¶ 283;
Aldevra, B-406205, Mar. 14, 2012, 2012 CPD ¶ __; Crosstown Courier
Service, Inc., B-406262, Mar. 21, 2012, 2012 CPD ¶ __

This letter is submitted pursuant to 31 U.S.C. § 3554(e)(1) (2006), which requires our Office to report any case in which a Federal agency fails to fully implement a recommendation of the Comptroller General in a bid protest decision.

The subject bid protest decisions concerned procurements in which the Department of Veterans Affairs (VA) used General Services Administration Federal Supply Schedule (FSS) procedures without first considering whether two or more service-disabled, veteran-owned small business (SDVOSB) or veteran-owned small business (VOSB) concerns were capable of meeting the agency's requirements at a reasonable price. The protesters, all SDVOSB concerns, argued that the Veterans Benefits Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128 (2006) (the 2006 VA Act), required VA to conduct such market research to determine whether the procurements should be set aside for SDVOSB concerns. The 2006 VA Act states in relevant part:

(d) Use of restricted competition.--Except as provided in subsections (b) and (c),^[1] for purposes of meeting the goals under subsection (a),^[2] 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 if the

¹ Subsections (b) and (c) permit the use, under certain circumstances, of noncompetitive procedures when VA enters into contracts with SDVOSB and VOSB concerns.

² Subsection (a) states that in order to increase contracting opportunities for SDVOSB and VOSB concerns, VA shall establish a goal for each fiscal year for participation in VA contracts by SDVOSB and VOSB concerns.

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.

38 U.S.C. § 8127(d) (2006); see also VA Acquisition Regulation, 48 C.F.R. § 819.7005(a) (2011).

In each protest, our Office found that it was improper for the VA to use FSS procedures without first determining whether the acquisition should be set aside for SDVOSB concerns. This was consistent with a prior decision issued by our Office, Aldevra, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶ 183, in which we found that the plain language of the 2006 VA Act requires the VA to conduct market research to determine whether a VA procurement should be set aside for SDVOSB concerns.

In each of our protest decisions, we recommended that the VA conduct market research regarding its requirements. We also recommended that if, as a result of this research, the VA determines that there is a reasonable expectation that two or more SDVOSB concerns can meet the solicited requirement at a reasonable price, the agency should re-solicit the requirement as a set-aside for SDVOSB concerns. Finally, we recommended that the VA reimburse the protesters for the costs of filing and pursuing their protests.³

By letters dated February 16 (Kingdomware), March 16 (Aldevra), and March 22, 2012 (Crosstown), the VA notified our Office that it would not follow our recommendations.⁴ The VA letters stated that its reasons for not following the recommendations were set forth in a January 4 letter to our Office, which responded to the second Aldevra protest. In the January 4 letter, the VA took the position that the 2006 VA Act only requires the VA to consider SDVOSB set-asides in connection with attaining the agency's SDVOSB contracting goals. The VA's January 4 letter also took the position that where FSS procedures are used and an SDVOSB is not an FSS contract holder, the SDVOSB is not entitled to any preference under the 2006 VA Act.

Given that our Office has concluded on four recent occasions that the 2006 VA Act requires the VA to conduct market research to determine whether a procurement

³ In Kingdomware, the VA had issued a delivery order under the protested solicitation. Accordingly, in that protest we additionally recommended that if the VA determines that two or more SDVOSB concerns can meet the requirement at a reasonable price, the agency should cancel the delivery order.

⁴ Following our first Aldevra decision (Oct. 11, 2011), the VA canceled the procurement in its entirety, thereby rendering our recommendation academic.

should be set aside for SDVOSB concerns before using FSS procedures, we intend to summarily sustain future protests which raise this issue.⁵ If we sustain similar protests throughout the remainder of this fiscal year, and the VA similarly declines to follow our recommendations, we will notify the Congress at the end of the year.

Enclosed for your review are copies of our decisions in the protests and the VA's letters of January 4, February 16, March 16, and March 22.

Sincerely yours,



Lynn H. Gibson
General Counsel

Enclosures

cc: The Honorable Daniel K. Inouye
Chairman
The Honorable Thad Cochran
Vice Chairman
Committee on Appropriations
United States Senate

The Honorable Joseph I. Lieberman
Chairman
The Honorable Susan M. Collins
Ranking Member
Committee on Homeland Security and Government Affairs
United States Senate

The Honorable Patty Murray
Chairman
The Honorable Richard Burr
Ranking Member
Committee on Veterans Affairs
United States Senate

The Honorable Mary L. Landrieu
Chairman
The Honorable Olympia J. Snowe

⁵ If, in responding to future protests, the VA presents arguments that have not previously been presented, we will, of course, address such arguments.

Ranking Member
Committee on Small Business and Entrepreneurship
United States Senate

The Honorable Harold Rogers
Chairman
The Honorable Norm Dicks
Ranking Member
Committee on Appropriations
House of Representatives

The Honorable Darrell E. Issa
Chairman
The Honorable Elijah Cummings
Ranking Member
Committee on Oversight and Government Reform
House of Representatives

The Honorable Jeff Miller
Chairman
The Honorable Bob Filner
Ranking Member
Committee on Veterans Affairs
House of Representatives

The Honorable Sam Graves
Chairman
The Honorable Nydia M. Velazquez
Ranking Member
Committee on Small Business
House of Representatives



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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Aldevra

File: B-406205

Date: March 14, 2012

Rodney Marshall for the protester.

Dennis Foley, Esq., Department of Veterans Affairs, for the agency.

Matthew T. Crosby, Esq., Glenn G. Wolcott, Esq., and Sharon L. Larkin, Esq.,
Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The Veterans Benefits, Health Care, and Information Technology Act of 2006 requires the Department of Veterans Affairs to determine whether two or more service-disabled veteran-owned small business concerns can meet its requirement at a reasonable price before proceeding with a Federal Supply Schedule acquisition.

DECISION

Aldevra, of Portage, Michigan, a service-disabled veteran-owned small business (SDVOSB) concern protests the terms of solicitation No. 666-12-1-992-0002,¹ issued by the Department of Veterans Affairs (VA) for an ice maker/dispenser for shipment to Sheridan, Wyoming. Aldevra asserts that the agency improperly failed to comply with an applicable statute and regulation to determine if this procurement should be set aside for SDVOSB concerns.

We sustain the protest.

BACKGROUND

This procurement is being conducted pursuant to General Services Administration Federal Supply Schedule (FSS) procedures and implementing regulations, set forth at Federal Acquisition Regulation (FAR) subpart 8.4. See Agency Report (AR) at 1.

¹ The solicitation also was designated as FedBid Buy No. 311768.

In accordance with those regulations, the solicitation was issued on an unrestricted basis to vendors holding FSS contracts. Id.

Aldevra filed this protest prior to the closing time for the solicitation, arguing that the agency acted improperly by using FSS procedures without first conducting market research to determine whether the procurement should be set aside for SDVOSB concerns. Protest at 1-2. Aldevra asserts that if the agency had conducted market research, it would have found that at least two SDVOSBs could meet the requirement at a reasonable price. Id. at 2. The agency concedes that it did not conduct market research to determine whether two or more SDVOSB concerns could meet the requirement at a reasonable price. Agency E-mail to GAO (Jan. 14, 2012).

The issue raised in this protest is identical to the issue presented in a prior protest filed by Aldevra. See Aldevra, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶ 183. Specifically, this protest concerns the Veterans Benefits, Health Care, and Information Technology Act of 2006 (the VA Act), which provides in part:

(d) Use of restricted competition.--Except as provided in subsections (b) and (c),^[2] 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 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.

38 U.S.C. § 8127(d) (2006). The statute also establishes an order of priority for awarding contracts to small business concerns, providing that the first priority shall be given to SDVOSB concerns, followed by veteran-owned small business (VOSB) concerns. Id. § 8127(i). Following enactment of the statute, the VA issued implementing regulations which, as relevant here, state as follows:

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

(1) Offers will be received from two or more eligible SDVOSB concerns; and

² Subsections (b) and (c), permit the use, under certain circumstances, of noncompetitive procedures when the VA enters into contracts with SDVOSB and VOSB concerns.

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

Veterans Administration Acquisition Regulation (VAAR), 48 C.F.R. § 819.7005(a) (2011).^[3]

Our Office sustained Aldevra's prior protest, finding that nothing in the VA Act or the VAAR provides the agency with discretion to conduct a procurement under FSS procedures without first determining whether the acquisition should be set aside for SDVOSB concerns.

DISCUSSION

Aldevra's Interested Party Status

As an initial matter, the agency, citing FitNet Purchasing Alliance, B-309911, Nov. 2, 2007, 2007 CPD ¶ 201, asserts that Aldevra is not an interested party to protest this procurement because the firm does not hold an FSS contract. AR at 2, 6-7, 11-12.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (2006), only an interested party may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a)(1) (2011). A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. Four Winds Servs., Inc., B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57.

We disagree with the agency that Aldevra is not an interested party to pursue this protest. The protest here involves an allegation that the VA is required to conduct set-asides where specific conditions are met under a unique statute applicable only to the VA (i.e., the VA Act), rather than meeting its requirements using the FSS. In addition, the agency here has not contended that there is a reasonable expectation that two or more SDVOSB concerns holding FSS contracts could meet the requirement.⁴ For these reasons, and due to Aldevra's uncontroverted representations that it is a verified SDVOSB concern that sells the item being

³ These references to other VA regulations concern the use of other than competitive procedures to enter into contracts with SDVOSB or VOSB concerns (48 C.F.R. § 813.106), and procedures for the award of sole-source contracts to SDVOSB and VOSB concerns (48 C.F.R. §§ 819.7007, 819.7008).

⁴ As stated above, the agency admits that it did not conduct market research to determine whether two or more SDVOSB concerns could meet the requirement at a reasonable price. Agency E-mail to GAO (Jan. 14, 2012).

procured here, see Protest at 2; Comments at 2, we find that Aldevra is an interested party to pursue this protest.⁵

The Plain Meaning of 38 U.S.C. § 8127

With respect to the merits of Aldevra's protest, the agency maintains that it need not have considered whether two or more SDVOSB concerns could meet the requirement at a reasonable price before conducting the procurement through the FSS program because our decision in the prior protest was incorrect. AR at 1, 8-10. In this regard, the agency argues that in resolving the prior protest, our Office failed to recognize that 38 U.S.C. § 8127(d) includes the phrase "for purposes of meeting the goals under subsection (a)," which, according to the agency, qualifies the requirement for the agency to preliminarily determine whether a procurement should be set aside for SDVOSB concerns. See id. at 8-9. Subsection (a), as referenced in subsection (d), states in relevant part:

(1) In order to increase contracting opportunities for [SDVOSB and VOSB concerns], the Secretary [of the VA] shall--

(A) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by [VOSB concerns]; and

(B) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by [SDVOSB concerns].

38 U.S.C § 8127(a).

The agency argues that the phrase "for purpose of meeting the goals under subsection (a)" signals that "Congress did not . . . require that this authority [referenced in subsection (d)] be used in conducting all VA procurements, including FSS purchases." AR at 2. Thus, according to the agency, the statute should be interpreted to mean that the "VA may consider its current achievements vis-à-vis

⁵ The agency's position that Aldevra is not an interested party also relies on two decisions by the United States Court of Federal Claims: Mobile Medical Intern Corp. v. United States, 95 Fed. Cl. 706 (2010); and MED Trends, Inc. v. United States, 101 Fed. Cl. 638 (2011). Mobile Medical Intern Corp. involved a VA FSS procurement, but there was no allegation that the VA violated the VA Act. MED Trends did not involve a VA FSS procurement, but rather a challenge to the award of a task/delivery order placed under an indefinite delivery/indefinite quantity contract, the terms of which the protester did not challenge prior to the solicitation closing date. Accordingly, neither of these decisions bears on whether Aldevra is an interested party for purposes of this protest.

attaining the Secretary's SDVOSB/VOSB contracting goals in deciding to do restricted competitions." Id. at 9.

As an initial matter, although the agency has defended numerous protests before our Office involving precisely this issue, this is the first time that the agency has raised these arguments. Thus, until this protest, the agency had not suggested that the phrase "for purposes of meeting the goals under subsection (a)" as it appears in 38 U.S.C. § 8127(d) grants the agency discretion to decide that in some procurements the mandate in the statute will apply, and in other procurements it will not.

In matters concerning the interpretation of a statute, the purpose is clear: to determine and give effect to the intent of the enacting legislature. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975). In furtherance thereof, the first question is whether the statutory language provides an unambiguous expression of the intent of Congress. If it does, the matter ends there, for the unambiguous intent of Congress must be given effect. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

We find that the plain language of 38 U.S.C. § 8127(d) mandates that the VA "shall" conduct its procurements using an SDVOSB (or VOSB) set-aside when there is a reasonable expectation that two or more SDVOSB (or VOSB) concerns can meet the requirement at a reasonable price. The phrase "for purposes of meeting the goals" is part of an introductory clause that establishes exceptions to the mandate (those exceptions being when subsections (b) and (c) apply). The phrase explains the purpose for the mandate, which is to meet the goals established under subsection (a); however, the phrase does not create an exception to the mandate.

In addition, the exceptions set out in subsections (b) and (c) of section 8127 use the discretionary term "may," in contrast to subsection (d)'s use of the mandatory term "shall." This distinction provides further evidence of a congressional intent to require--rather than permit--SDVOSB or VOSB set-asides under subsection (d), when conditions of the statute are met.

Finally, we note that the legislative history of the VA Act underscores that 38 U.S.C. § 8127 was intended to broadly foster participation in VA procurements by SDVOSB and VOSB concerns. For example, the House Committee on Veterans' Affairs report accompanying the bill that ultimately was enacted stated, among other things, that the bill would "[p]rovide veteran and service-disabled, veteran-owned small businesses priority in VA contracting" H.R. REP. NO. 109-592 (2006) at 12. The committee report also included the statement that "the Committee believes that small businesses owned and controlled by veterans and service-disabled veterans should routinely be granted the primary opportunity to enter into VA procurement contracts." Id. at 14-15. We read these statements to reflect a

congressional expectation that the VA generally will conduct procurements with the purpose of meeting the SDVOSB and VOSB participation goals.⁶

VA's Remaining Contentions

For the record, the VA argues that our Office should abandon our previous conclusions about the plain meaning of this statute, and should instead conclude that the statute is ambiguous, and show deference to one of the VA's interpretations of the statute. In our view, the VA has not yet proffered an interpretation to which we can properly defer.

With respect to the VA's newly-raised argument that our Office should defer to its view that the phrase in section 8127(d) that states "for purposes of meeting the goals under subsection (a)" permits the agency to, in some circumstances, disregard the statute, we note first that this interpretation is nowhere to be found in the VA's 2009 notice and comment rulemaking. In essence, the VA seeks Chevron deference for a rulemaking it has never performed.⁷ Despite this lack of rulemaking, the VA now claims blanket discretion to define the scope of procurements to which the statutory mandate applies. We see no basis for this broad discretion.

With respect to the VA's previously-raised argument that our Office should defer to its 2009 rulemaking that stated that the FAR language in Part 19 applies to the SDVOSB set-aside program created by the VA Act, the VA's conclusions in that rulemaking were refuted by the express language of the FAR section upon which the VA relies. See Aldevra, supra, at 5 (explaining that FAR subpart 19.14--the only subpart within FAR Part 19 that addresses set-asides for SDVOSBs--implements the requirements of the Veterans Benefit Act of 2003, which applies government-wide, and not the 2006 VA Act, which applies only to VA procurements).

Finally, we turn to the VA's additional argument that our decision in the prior protest did not give meaning to 38 U.S.C. § 8128(a)--a separate subsection of the VA Act, which provides, in its entirety, as follows:

⁶ We note for the record that the language of 38 U.S.C. § 8127(d) as enacted by Congress is identical to the language in the bill described in the above-referenced House report. Compare H.R. REP. No. 109-592 at 3, with 38 U.S.C. § 8127(d).

⁷ The Supreme Court has held that where an agency interprets an ambiguous provision of a statute through a process of rulemaking or adjudication, unless the resulting regulation or ruling is procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute, the courts will defer to this agency interpretation. Chevron, 467 U.S. at 843-45; see also United States v. Mead Corp., 533 U.S. 218, 227-38 (2001).

(a) Contracting priority.--In procuring goods and services pursuant to a contracting preference under this title or any other provision of law, the Secretary [of the VA] shall give priority to a small business concern owned and controlled by veterans, if such business concern also meets the requirements of that contracting preference.

38 U.S.C. § 8128(a). Based on this subsection, the agency argues that “if a SDVOSB/VOSB is not a FSS contract holder, it cannot be viewed as meeting the same requirements of that contracting preference, the FSS program, and, therefore, is not entitled to any priority preference.” AR at 9-10.

We disagree with the VA’s characterization of the FSS program as a “contracting preference.” Instead, we read 38 U.S.C. § 8127(d) to require a preliminary determination about whether there was a reasonable expectation that two or more SDVOSB (or VOSB) concerns can meet the requirement at a reasonable price. Once the agency makes this determination, the agency then can determine whether to apply another contracting preference or to proceed using FSS procedures.

In sum, we find unreasonable, and inconsistent with the statute, the agency’s failure to determine whether two or more SDVOSB concerns can meet the requirement at a reasonable price before using FSS procedures.

RECOMMENDATION

We recommend that the agency conduct reasonable market research regarding its requirement under the solicitation. If it determines that there is a reasonable expectation that two or more SDVOSB (or VOSB) concerns can meet the requirement at a reasonable price, we recommend that the agency cancel the solicitation and re-solicit the requirement as an SDVOSB (or VOSB) set-aside. We also recommend that the agency reimburse the protester the costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1). 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. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
General Counsel



Decision

Matter of: Kingdomware Technologies

File: B-405727

Date: December 19, 2011

LaTonya Barton the protester.
Matthew V. Edwards, Esq., Department of Veterans Affairs, for the agency.
Linda C. Glass, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

The Department of Veterans Affairs (VA) improperly used non-mandatory Federal Supply Schedule procedures to procure services, rather than using a set-aside for service-disabled veteran-owned small businesses, where the applicable statute-- 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.

DECISION

Kingdomware Technologies, of Waldorf, Maryland, a service-disabled veteran-owned small business (SDVOSB) concern, protests the corrective action taken by the Department of Veterans Affairs (VA) in response to the firm's protest of the terms of request for quotations (RFQ) No. VA-261-11-RQ-1514 for subscription and support services at the VA San Francisco Medical Center. The protester asserts that the VA improperly failed to comply with applicable statutes and regulations to determine whether the procurement should be set aside for SDVOSB concerns.

We sustain the protest.

BACKGROUND

The RFQ, issued on September 13, 2011, sought quotations by September 15 for a brand name (LiveProcess Enterprise) subscription and support services for a 1-year term. On September 15, Kingdomware protested to our Office, arguing that the RFQ was improperly restricted to the brand name because the protester provided similar subscription services. The protester also argued that the VA failed to conduct proper

market research, as required by Federal Acquisition Regulation (FAR) § 19.1405 (a), (b), to determine whether the requirement should be set aside for SDVOSBs.

In response to the protest, the agency advised our Office by letter of September 28 that it would take corrective action. Specifically, the VA stated that:

VA has determined that its sole source award to Live Process may not have been in accordance with the Federal Acquisition Regulation and prior GAO case law. VA will undertake corrective action in the instant protest by creating a requirement that is broadly defined and re-solicit it. The new solicitation or request for quote will include a revised statement of work, and other changes deemed appropriate. Also, VA will terminate the sole source award to Live Process. However, VA intends to solicit this requirement under FAR 8.4 which is exempt from FAR 19 requirements (FAR 8.404(a)). The protester improperly cites FAR 19.1405(a) and (b) as authority for a Service Disabled Veteran Owned Small Business Set Aside over a "GSA Schedule opportunity." In addition, FAR 19.1404(c) excludes Federal Supply Schedule acquisitions from FAR 19.14.

VA's Motion to Dismiss at 1.

On October 5, the protester objected to the proposed corrective action, arguing that the Veterans Benefits Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128 (2006) (the 2006 VA Act) "enjoins the Department to make reasonable efforts to ascertain whether a solicitation can be set aside for service disabled veteran owned small businesses ('SDVOSB'), without regard to whether or not the SDVOSBs hold a Federal Supply Schedule ('FSS') contract." Protester's Response to Motion to Dismiss at 1. Kingdomware contends that the VA should conduct market research to determine whether the requirement could be set aside for SDVOSBs or Veteran-Owned Small Business (VOSB) concerns. *Id.* at 5.

On October 12, in light of our recent decision in *Aldevra*, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶ 183, we asked the VA if it intended to revise its proposed corrective action. In that decision we found that the VA improperly used non-mandatory Federal Supply Schedule procedures to procure items without conducting market research to determine if the procurements should be set aside for SDVOSBs in violation of the 2006 VA Act. We noted that 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 VOSBs. 38 U.S.C. § 8127(i).

On October 19, the VA responded that on the day it informed us of its proposed corrective action (September 28) the agency had executed the corrective action due to the expiration of fiscal year 2011 funds. Specifically, the VA states that on that date it canceled the sole source award to LiveProcess and issued a revised solicitation under FSS procedures for procurement of the services on a brand name or equal basis. The VA further states that it received quotations on September 29 and issued a delivery order on September 30. On October 26, the VA submitted its agency report in response to the protest.

DISCUSSION

The VA contends that Kingdomware has not been prejudiced by the agency's corrective action because the protester had the opportunity to submit a quotation in response to the revised FSS solicitation and chose not to do so. Agency Report at 2. The VA also argues that, because the protester did not submit a quotation, it is not an interested party to further challenge the procurement. Id. at 3.

As an initial matter, we disagree that Kingdomware is not an interested party to challenge the agency's actions. Under the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (2006) and our Bid Protest Regulations, 4 C.F.R. § 21.0(a)(1) (2011), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Here, Kingdomware protested the terms of the RFQ, arguing among other things that the VA had not reasonably determined whether the procurement should be set aside for SDVOSBs. Kingdomware also timely objected to the VA's proposed corrective action, arguing that in accordance with the 2006 VA Act the VA was required to perform market research to determine whether an SDVOSB set-aside was appropriate. Where, as here, the protester is challenging the terms of the solicitation, and the remedy sought is the opportunity to compete under a revised solicitation, the protester is an interested party, even if it did not submit a quotation or offer. See Courtney Contracting Corp., B-242945, June 24, 1991, 91-1 CPD ¶ 593 at 4-5.

We also do not agree with the VA that Kingdomware has not been prejudiced by the agency's actions. As noted above, in Aldevra, supra, we found that the VA's decision to procure items from the FSS without determining whether the procurement should

be set aside for SDVOSBs violated the 2006 VA Act. We also noted that the VA's regulations implementing the 2006 VA Act provide in relevant part:

(a) the contracting officer shall set aside an acquisition for competition restricted to SDVOSB concerns upon a reasonable expectation that:

(1) Offers will be received from two or more eligible SDVOSB concerns and;

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

VA Acquisition Regulation, 48 C.F.R. § 819.7005(a) (2010). Here, as in Aldevra, the VA has not conducted market research to determine if there are two or more eligible SDVOSBs capable of performing the agency's requirements.¹

In sum, consistent with our decision in Aldvera, we conclude that the 2006 VA Act requires that the agency make a determination whether an acquisition should be set aside for SDVOSB concerns prior to conducting a procurement using FSS procedures.

RECOMMENDATION

We recommend that the agency conduct reasonable market research regarding its requirements. If as a result of this research the VA determines that there are two or more SDVOSB concerns capable of performing the requirement, the agency should cancel the award and re-solicit its requirement as a set aside for SDVOSBs. We also recommend that the agency reimburse the protester the costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1) (2011). Kingdomware'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 protest is sustained.

Lynn H. Gibson
General Counsel

¹ Although the VA contends that Kingdomware has not proven that there are two or more SDVOSBs that can perform the requirements, the agency does not assert that there are not two or more eligible SDVOSBs that could perform.



G A O

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**Comptroller General
of the United States**

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

Decision

Matter of: Crosstown Courier Service, Inc.

File: B-406262

Date: March 21, 2012

Christopher Noyes, Crosstown Courier Service, Inc., for the protester.
Kate Gorney, Esq., and Dennis Foley, Esq., Department of Veterans Affairs, for the agency.

Jacqueline Maeder, Esq., Scott H. Riback, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The Veterans Benefits, Health Care, and Information Technology Act of 2006 requires the Department of Veterans Affairs to determine whether two or more service-disabled veteran-owned small business concerns can meet its requirement at a reasonable price before proceeding with a Federal Supply Schedule acquisition.

DECISION

Crosstown Courier Service, Inc. of Chicopee, Massachusetts, a service-disabled veteran-owned small business (SDVOSB) concern, protests the terms of request for quotations (RFQ) No. VA261-11-RQ-1653, issued by the Department of Veterans Affairs (VA) for commercial courier services to transport diagnostic blood and urine specimens on a set schedule from outlying VA laboratories to the main VA laboratories in Palo Alto and Livermore, California. Crosstown asserts that the agency improperly failed to comply with the requirement of the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128 (2006) (the VA Act), and its implementing regulations to determine whether this procurement should be set aside for SDVOSB (or veteran-owned small business (VOSB)) concerns.

We sustain the protest.

This procurement is being conducted pursuant to General Services Administration Federal Supply Schedule (FSS) procedures and implementing regulations, set forth at Federal Acquisition Regulation (FAR) subpart 8.4. In accordance with those

regulations, the solicitation was conducted as a discretionary small business set aside confined to small business vendors holding FSS contracts. FAR § 805-5.

Crosstown asserts that the VA acted improperly by using FSS procedures without first conducting market research to determine whether the procurement should be set aside for SDVOSB (or VOSB) concerns. Crosstown maintains that if the agency had conducted market research, it would have found that at least two SDVOSBs could meet the requirement at a reasonable price. The agency concedes that it did not conduct market research to determine whether two or more SDVOSB (or VOSB) concerns could meet the requirement at a reasonable price.

By decision dated March 14, 2012, Aldevra, B-406205, Mar. 14, 2012, 2012 CPD ¶ ___, we sustained a protest filed by another SDVOSB concern against a VA procurement being conducted pursuant to FSS procedures in which, like here, the protester asserted that the agency had failed to comply with the requirements of the VA Act and its implementing regulations. The issue raised and the agency's arguments in the recent Aldevra protest are the same as the issue and arguments presented here; in fact, the arguments presented in the agency's briefs in both cases are identical.

For the same reasons that we discussed at length in our recent decision, we reject the VA's arguments in the current protest. Here, as in Aldevra, supra, the VA has not conducted market research to determine if there are two or more eligible SDVOSB (or VOSB) concerns capable of performing the agency's requirements. Consistent with our recent decision, we conclude that the 2006 VA Act requires that the agency make a determination whether an acquisition should be set aside for SDVOSB (or VOSB) concerns prior to conducting a procurement using FSS procedures. We therefore sustain Crosstown's protest.

RECOMMENDATION

We recommend that the agency conduct reasonable market research regarding its requirement under the solicitation. If it determines that there is a reasonable expectation that two or more SDVOSB (or VOSB) concerns can meet the requirement at a reasonable price, we recommend that the agency cancel the solicitation and re-solicit the requirement as an SDVOSB (or VOSB) set-aside. We also recommend that the agency reimburse the protester the costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1) (2011). Crosstown's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
General Counsel