



Veterans' Entrepreneurship Task Force (VET-Force)

8719 Colesville Road, Silver Spring, MD 20910
Tel: 301.585.4000 Fax: 301.585.0519

November 8, 2011

Dear Member of Congress,

Subject: VA Violation of 38 USC 8127 and 8128

Since 2008, the VA has had a policy of telling their procurement people to go to GSA Schedules in lieu of PL 109-461 "Veterans First".

On September 2, 2011, CMARK Group filed a very detailed GAO Protest against the VA for using Federal Supply Schedules (FSS) thereby excluding many Service-Disabled Veteran-Owned Small Businesses (SDVOSB's) and disregarding the PL 109-461 "Veterans First" requirement. Within one day after GAO and VA were notified of the protest the VA cancelled the solicitation stating that the funds had been revoked by upper VA management. By doing so, the VA avoided a ruling from GAO that the VA was violating the PL 109-461 "Veterans First" program. See attachment A.

Mr. Rodney Marshall, CEO of Aldevra, Inc, a Service-Disabled Veteran-Owned Small Business had a similar GAO protest that was granted on October 11, 2011. See Attachment B.

October 17, 2011, Mr. Wayne A. Simpson VA (OAL) sent an internal VA only email forwarding "AN IMPORTANT MESSAGE FROM VA's SENIOR PROCUREMENT EXECUTIVE*****" Mr. Jan R. Frye, Deputy Assistant Secretary for Acquisition and Logistics, and VA's Senior Procurement Executive. Mr. Frye's email was summarized in paragraph 4 that states: "4. Therefore, VA determined this GAO recommendation, Aldevra, B-405271 and B-405524, dated October 11, 2011, shall not be followed. We expect this issue ultimately will be decided by the courts. Therefore, VA acquisition and procurement professionals are to continue using the Federal Supply Schedules Program, when necessary and appropriate. The GAO recommendation does not change how VA will acquire goods and services in support of its mission." See Attachment C.

Scott H. Riback, Esq., GAO Procurement Law Control Group informed GAO that "We are in receipt of the referenced protest filed by Aldevra. Please be advised that the US Dept. of Veterans Affairs will not be following the recommendations from GAO in the Aldevra protests B-405271; B-405524. See Attachment D.

The Veterans Entrepreneurship Task Force (VET-Force) points out that PL 109-461 was signed on December 22, 2006 with a directed implementation date of 180 days or June 20, 2007. VA's implementation date was January 7, 2010. We have seen this law modified and adjusted from within the ranks of the Veterans Affairs Agency and its management for their benefit, outside of what our Congressional leaders have said. This is considered Color of Law Abuse and is subject to the laws of abuse of authority. We have to view what is the real nature of PL 109-461, a cause, a message, or in fact a law that has a fundamental meaning supported by congress for our veterans who again, have given and provided honor in their service to this nation.

Association for Service
Disabled Veterans

Association of Small
Business
Development Centers

American G.I. Forum of the
United States

AMVETS (American
Veterans)

Black Veterans for Social
Justice, Inc.

Blinded Veterans
Association

Center for
Veterans Issues

Enlisted Association of the
National Guard

Jewish War Veterans
of the USA

Korean War Veterans
Association

National Association for
Black Veterans

National Association for
Uniformed Services

National Coalition for
Homeless Veterans

Non Commissioned Officers
Association of the United
States of America

Paralyzed Veterans
of America

Reserve Officers Association
of the United States

The Retired Enlisted
Association

The Veterans Advocacy
Foundation

Veterans Benefits
Clearinghouse

Veterans Business Network

Veterans Enterprise,
Training & Services Group

Veterans of Modern Warfare

Vetpreneur, LLC

Vietnam Veterans
of America

Vietnam Veterans of
California

Subject: VA Violation of 38 USC 8127 and 8128

November 8, 2011

Abuse of authority by any Federal employee, in changing or modification of a congressional Public Law is an arbitrary or capricious exercise of power that does adversely affect the rights of the very veterans that the Veterans Affairs Agency is to support.

When we see the contracting community of the VA take on a position which includes a wide range of subjects to include improper use of one's rank, title, this is no more than a violation of "Color of Law". We cannot change PL 109-461 unless by constitutional authority and acts of congress or the President of the United States. Individual federal employees cannot on their own chose to modify any law that congress has issued. Therefore we are doing a fundamental injustice to the men and women who served our nation with honor and now want to return to do more for their nation by serving as entrepreneurs. Let not our nation fail for the poor judgments of a few that would do an injustice to our honored veteran's.

The VET-Force believes the VA will continue to steal from Veterans because the VA procurement executives have swayed from the Veterans Administrations Mission Statement. "To fulfill President Lincoln's promise "To care for him who shall have borne the battle, and for his widow, and his orphan" by serving and honoring the men and women who are America's veterans. In 1999 with PL 106-50 and again in 2006 with PL 109-461 we veterans hoped that when the younger veterans return from war they will have great opportunity by being employed by strong veteran small business firms or they can begin with their own business.

It appears that disabled veterans will continue to be sent home with a check and little opportunity.

The present paragraph "38 USC § 8128. Small business concerns owned and controlled by veterans: contracting priority" is

"(a) CONTRACTING PRIORITY.—In procuring goods and services pursuant to a contracting preference under this title or any other provision of law, the Secretary 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."

We need congress and the President to be very clear without necessary interpretation as to the meaning of "Veteran First." To do this, 38 USC 8128(a) should be modified by adding the following at the end of the paragraph:

"No contract, delivery order, or task order will be awarded to a non veteran firm without written justification substantiating the reason why the intent of this paragraph was not applied and a contract was not awarded to a veteran-owned or service-disabled veteran-owned small business."

In Support of Our Veteran,



Richard Weidman, VET-Force Chairman
(301) 585-4000 x127

Cc: VET-Force Executive Committee



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IMMEDIATE AGENCY NOTIFICATION REQUESTED

September 2, 2011

Office of General Counsel
U.S. Government Accountability Office
Procurement Law Control Group
441 G Street, N.W.
Washington, D.C. 20548

By Email

Re: Protest of CMARK Construction, Inc., Under U.S. Department of Veterans Affairs Solicitation No. VA-247-11-RQ-0380

Dear Sir or Madam:

CMARK Construction, Inc. ("CMARK") hereby protests the award of a contract under Solicitation No. VA-247-11-RQ-0380 issued by the U.S. Department of Veterans Affairs, W.J.B. Dorn VA Medical Center ("VA") for the purchase of Food Service Equipment.

The date and time for receipt of proposals under this solicitation is September 2, 2011, at 2:00 PM EST. This protest is filed prior to the time for receipt of proposals.

I. THE PARTIES TO THIS PROTEST

Protester's contact information is:

Charles W. Jones, Jr.
President, CMARK Construction, Inc.
9570 Two Notch Rd. Suite 4
Columbia, SC 29223
charles@cmark.org
Tel. (803) 699-4940, extension 111

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CMARK is represented in this matter by Cohen Mohr LLP. The Cohen Mohr attorneys on this pleading are Victor G. Klingelhofer (vklingelhofer@cohenmohr.com) and William J. Bainbridge (bbainbridge@cohenmohr.com). The contact information for Cohen Mohr LLP is set forth above.

The contracting agency is the U.S. Department of Veterans Affairs, W.J.B. Dorn VA Medical Center. The CO's contact information is:

David Thomas
U.S. Department of Veterans Affairs
W.J.B. Dorn VA Medical Center
6439 Garners Ferry Road
Columbia, SC 29209-1639
Ph: (803) 695-7995
FAX: (803) 695-6769
Email: david.thomas69e89@va.gov

II. INTERESTED PARTY STATUS

CMARK is an interested party because it is a service disabled veteran owned small business and is submitting a proposal under this solicitation. But for the violations alleged in this protest, CMARK would have a substantial chance of receiving an award.

III. TIMELINESS AND SUSPENSION

This protest is being filed prior to the date and time established for the receipt of proposals and is therefore timely. In accordance with 31 U.S.C. § 3553(c) and FAR § 33.104(b)(1), CMARK requests **GAO promptly notify the agency so that contract award may be stayed while this protest is pending.**

IV. FACTUAL SUMMARY

A. The Solicitation.

Solicitation No.VA-247-11-RQ-0380 was issued on August 18, 2011, and was amended five times. The solicitation is for Requests for Quotations under the GSA eBuy Program from offerors holding current GSA Schedule 73 contracts. No priority was given to service disabled veteran owned small businesses in this procurement.

The solicitation contained the following with regard to evaluation and award:

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FAR Part 8.405-2 (4.d) Evaluation. The ordering activity shall evaluate all responses received using the evaluation criteria provided to the schedule contractors.

Requirement will be evaluated in the following manner: **Best Value**

In order to determine as the **Best Value**, the contractor shall address at a minimum the following criteria below:

Technical ability:

Contractor ability to meet or exceed all equipment specification as indicated in the RFQ

Contractor ability to meet or exceed all installation requirements as specified in the RFQ

Contractor ability to address and submit an acceptable trade-in allowance for all items identified in line item 67.

Adequate Turn-in plan

Price- Lowest price after all other requirements has been met.

Past Performance – The contractor must submit at least two instances whereas they have provide relevant equipment and installation experiences within the past 3 years.

Solicitation No. No. VA-247-11-RQ-0380, p. 5 (emphasis in original).

Finally, the solicitation also provided for a mandatory site visit on August 24, 2011, stating that: “Any vendor that does not attend or make necessary arrangements to review the installation site layout prior to Wednesday, 24 August 2011, shall not be eligible for award.” CMARK was one of three prospective offerors who attended the mandatory site visit.

V. GROUNDS OF PROTEST.

A. The VA failed to comply with the requirements of 38 USC 8127 and 8128 and 48 CFR 819.7005.

Congress’ intent in creating Public Law 109-461 was to provide the mechanism whereby the Department of Veterans Affairs, the agency responsible for veterans after their active duty,

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will provide an opportunity for those veterans to do business with the Federal government. P.L. 109-461 amended 38 USC 8127 and 8128, which apply to only the VA. Where there are conflicts within the VA between the VA Acquisition Regulations implementing the requirements of 38 USC 8127 or 8128 and the Federal Acquisition Regulations, the VAAR requirements prevail.

38 USC 8127(d) requires unambiguously that VA contracting officers “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.”

Thus, where there are conflicts within the VA between the VA Acquisition Regulations implementing the requirements of 38 USC 8127 and the Federal Acquisition Regulations such as those permitting the use of GSA schedule contract purchases, the VAAR requirements for veteran-owned business priority prevail. This has been recognized by the VA. Its comments on the Final Rule implementing the required modification of the VA Acquisition Regulations mandated by P.L. 109-461 state:

VA is required to give priority in contracting to small businesses owned and controlled by veterans, but the program is not intended to have government-wide applicability under the FAR. Congress has not authorized a similar procurement program applicable to all federal agency contracting. Accordingly, this rulemaking is limited to VA and therefore, can only be implemented in VA's FAR supplement, the VAAR. This VA specific rule is a logical extension of VA's mission to care for and assist veterans in returning to private life. It provides VA with the new contracting flexibilities to assist veterans in doing business with VA. SDVOSBs and VOSBs will obtain valuable experience through this VA program that can be useful in obtaining contracts and subcontracts with other government agencies as well.

74 FR 64619-01, December 8, 2009 (emphasis added).

Powerhouse Design Architects & Engineers, Ltd., B-403175, Oct. 7, 2010, 2010 CPD ¶ 240, involved an analogous situation involving the award of an architect-engineering services contract. The protester alleged that the VA failed to comply with 38 USC 8128(d) in not setting aside the procurement for SDVOSB concerns. Your office found controlling VAAR 48 CFR 819.7005(a), implementing 38 USC 8127(d), which states in relevant part:

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(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) Award will be made at a reasonable price.

2010 CPD ¶ 240 at 3 (emphasis in original). The protest was sustained on the basis that the VA had not made the required determination as to whether “there was a reasonable expectation that it would receive offers from two or more SDVOSB concerns and award would be made at a reasonable price. *Id.* at 7.

Here, the VA similarly ignored the requirements of 38 USC 8127(d) and 48 CFR 819.7005(a). There is no evidence that the VA contracting officer did anything other than go straight to a GSA schedule contract purchase for this acquisition. Simply put, this violates the requirement that the contracting officer first determine whether the requirement can be met by eligible SDVOSBs at a reasonable price. No such determination was even considered here.

All VA purchases – including the GSA schedule purchase the VA seeks to conduct here – fall under the requirements of 38 USC 8127 and the implementing VAAR provisions.¹ The VA’s failure to even consider the requirement for SDVOSB priority violates both the law and the VA’s priority obligations to America’s veterans. Solicitation No. VA-247-11-RQ-0380 must be cancelled so that the required determination can be made.

B. The Solicitation's "Brand Name Or Equal" Requirements Are Unduly Restrictive Of Competition.

The protested procurement purports to solicit items on a "brand name or equal" basis; however, a review of the detailed specifications reveals that vendors are required to provide brand name only items.

It is axiomatic that the purpose of issuing an RFQ to vendors on the FSS is to allow them to identify suitable equipment listed on their schedule. *Datum Filing Sys., Inc.*, B-230886.2, July 28, 1988, 88-2 CPD ¶ 97. Accordingly, the RFQ must furnish vendors with sufficient information to allow them to determine which of their products will meet the agency's minimum

¹ CMARK also notes that 38 USC 8128 requires that the VA give priority to veteran owned small businesses when “procuring goods and services pursuant to a contracting preference,” which would include a GSA schedule purchase under other than full and open competition.

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needs. This means that the RFQ should include a description with the *essential* physical and functional characteristics of the items required. *Knoll North America, Inc.*, B-259112, B-259113, March 8, 1995, 95-1 CPD ¶ 141 at 5-6. Conversely, an RFQ which fails to describe these characteristics, "improperly restricts competition by precluding potential offerors of equal products from determining what characteristics are considered essential for its items to be accepted." *Id.* (citing *Listo Int'l Corp.*, 63 Comp.Gen. 447 (1984), 84-1 CPD ¶ 665; T-L-C Sys., B-227470, Sept. 21, 1987, 87-2 CPD ¶ 283).

Here, the agency has provided specifications that are so painstaking and precise that the *only* acceptable option for vendors hoping to win this procurement is to propose the exact brand name items. For example, the very first item identified in the solicitation is a "LOW TEMPERATURE ELECTRONIC COOK & HOLD OVEN." RFQ at 6. The supposed "brand name or equal" characteristics reads more like a detailed MIL-SPEC.

Alto-Shaam Inc., Model 1200-TH/III, Double compartment low temperature Cook & Hold oven with Deluxe control, **Brand Name or Equal** (2) individually controlled oven compartments enclosed in one **20 gauge stainless steel** exterior cabinet. Each door is furnished with a magnetic door latch. Each compartment is equipped with two (2) stainless steel side racks with **eight (8) pan positions spaced on 2-5/16" (59mm) centers**, three (3) stainless steel wire shelves, and one (1) stainless steel drip pan with drain. Oven includes one (1) external drip tray and one (1) **set of 5" (127mm) heavy duty casters - 2 rigid, and 2 swivel with brake**. A single Deluxe control includes individual settings for upper and lower cavity and consists of a **4 digit L.E.D. display**, ON/ OFF key for each compartment; cook temperature key with an adjustable cook range from **2000F to 3250F (930C to 1620C)**...Control includes **eight (8) programmable menu keys** with locking capability along with the ability to set individual cook and hold parameters; hold mode count-up timer, indicator lights for operation status; and start key. The control has a built-in lock out feature and is equipped with a voltage conversion feature to match the line voltage provided by the electric power supplier. Halo Heatr Slo Cook & Hold Oven, electric, low-temp, double deck, std. depth, 120 lb capacity each - (4) **12" x 20" x 2-1/2" full-size pans**, (1) electric control, LED display, (8) programmable menu buttons, (6) s/s wire shelves, (1) exterior drip tray with removable pan, **heavy duty 20 gauge stainless steel, 5" casters**; 2 rigid, 2 swivel with brakes, EcoSmartr, UL, **CE POWER SUPPLY: 208-240v/60/1, 30.0 amps, 7.2 kW (NO cord or plug)** Solid Doors hinged right standard 1-yr parts & labor warranty, standard

Id. (bold in original) (bold italics emphasis added). Most of the other items solicited in this RFQ are similarly detailed. *See e.g. id.* at 8-17.

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The reason this particular example reads the way it does is because the VA copied its specifications verbatim from the manufacturer's product technical information sheet. The Alto-Shaam 1200 TH/III product information sheet, *which was included in the eBuy solicitation*, states:

Two (2) individually controlled oven compartments enclosed in one 20 gauge stainless steel exterior cabinet. Each door is furnished with a magnetic door latch. Each compartment is equipped with two (2) stainless steel side racks with eight (8) pan positions spaced on 2-3/16" (59mm) centers, three (3) stainless steel wire shelves, and one (1) stainless steel drip pan with drain. Oven includes one (1) external drip tray and one (1) set of 5" (127mm) heavy duty casters — 2 rigid, and 2 swivel with brake.

A single Deluxe control includes individual settings for upper and lower cavity and consists of a 4 digit L.E.D. display, ON/OFF key for each compartment; cook temperature key with an adjustable cook range from 200°F to 325°F (93°C to 162°C); time control key with set-points from 1 minute to 24 hours; probe control key with adjustable set-points between 50°F and 195°F (10°C to 91°C); and hold temperature key with an adjustable hold range from 60°F to 205°F (15°C to 96°C). Control includes eight (8) programmable menu keys with locking capability along with the ability to set individual cook and hold parameters; hold mode count-up timer, indicator lights for operation status; and start key. The control has a built-in lock out feature and is equipped with a voltage conversion feature to match the line voltage provided by the electric power supplier.

MODEL 1200-TH/III Double compartment low temperature Cook & Hold oven with Deluxe control

Alto-Shaam 1200 TH/III Product Specifications at 1.²

It is black letter Government Contracts law that agencies may not specify their requirements solely in terms of one particular firm's product unless the particular brand name or product "is essential to the government's needs, and market research shows that other companies' similar products lacking the particular feature do not meet the agency's needs, or cannot be modified to meet the agency's needs." *California Industrial Facilities Resources, Inc., d/b/a CAMSS Shelters*, B- 403397.3, March 21, 2011, 2011 CPD ¶ 71 at 5-6. And even in the rare instance where only a particular brand name will meet the agency's needs (which is not applicable here), the agency must "follow documentation and approval procedures for acquiring goods or services using other than full and open competition." *Id.* In our case there is no evidence to suggest the agency followed any of the required procedures to justify and document the need for brand name only items.

² The document from which the technical specifications were copied was included in the solicitation on eBuy. The document is identified as "DS02 SOLICITATION ATTACHMENT PICTURE-SPECS 1.pdf". Other examples of the overly restrictive nature of the item descriptions also can be seen in CLINs 46 and 47, where the items are required to be "66 3/8" long x 30" wide x 36" high" and "50 3/8" long x 30" wide x 36" high" respectively. RFQ at 36. Required dimensions down to an 1/8 of an inch level do not provide the latitude generally required for salient characteristics.

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The fact is that the VA has over-specified the items it seeks to procure. Notwithstanding the RFQ's "brand name or equal" provisions, vendors have no option but to propose brand name-only items in order to comply with the solicitation's detailed technical specifications. Therefore the VA is unduly restricting competition and this protest must be sustained. *Knoll North America, Inc.*, B-259112, B-259113, March 8, 1995, 95-1 CPD ¶ 141 (RFQ for furniture procurement utilizing the FSS, which listed part numbers and dimensions for one manufacturer's product line, was unduly restrictive of competition since it requested quotations on a brand name or equal basis, but did not otherwise describe required characteristics of the furniture system sought).

Moreover, there is no showing that products meeting valid salient characteristics could not meet the VA's minimum needs. As virtually the entire kitchen area is being refurbished,³ there in fact should be more flexibility regarding form and fit of the items of equipment being procured. Clearly multiple manufacturers produce functionally equal items of kitchen equipment. The solicitation should be amended to enhance competition by giving offerors flexibility in determining and offering manufacturers' products that are equal to the listed brand name equipment.

C. The Solicitation fails to comply with GSA schedule ordering requirements.

Non-FSS products and services may not be purchased using FSS procedures; instead, their purchase requires compliance with applicable procurement laws and regulations, including the requirement to use competitive procedures. *Symlicity Corp.*, B-291902, Apr. 29, 2003, 2003 CPD ¶ 89 at 4. Where an agency announces its intention to order from the FSS, all items quoted and ordered must be within the scope of the vendor's FSS contract. *Tarheel Specialties, Inc.*, B-298197, B-298197.2, July 17, 2006, 2006 CPD ¶ 140 at 4.

Consistent with this requirement, the VA informed vendors: "All products and services offered must be on your current GSA schedule contract... ***Please do not include open market items with your offer.***" RFQ604491 eBuy website (emphasis in original). At the same time, the RFQ states, "[t]he award will be made on a ALL or None basis. There will be no partial award under this solicitation." RFQ at 4. Taken together, these provisions meant that vendors are required to submit proposals that include all items solicited, and at the same time, all of those items must be on the vendor's FSS contract.⁴

³ See, e.g., DSO2 DIAGRAM LAYOUT, which was part of the solicitation package.

⁴ Curiously, despite the RFQ's express requirement that vendors *not* "include open market items", the RFQ identifies an "open market" requirement for removal services. RFQ at 43. Absent sufficient justification and documentation, this is improper. See *Symlicity Corp.*, supra.; *California Industrial Facilities*, supra.

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Solicitation No. No. VA-247-11-RQ-0380 describes CLIN 66 as follows:

66 1.00 JB _____
Product Number: custom removal
STATEMENT OF WORK - OPEN MARKET
Custom Model No. 1. Remove all tray cart docking stations, pump down systems, dispose of equipment, refrigerant and compressors. Disposal requires complete removal from campus.2. Demo Middleby Marshall bake and roast ferris wheel oven and remove from campus. Cut Stainless Steel and section removal, repair wall behind oven. 3. All work for installation of new equipment shall take place after business hours from 4 pm to 12 am. The kitchen will continue to operate during the renovation. Dust curtains are required while work is underway. Work areas must be cleaned up for use the next day. 5. Due to lack of storage space, the enduser will not be able to receive equipment via truckline. New equipment is required to be stored off site and brought in at night as needed 6. For each piece of new equipment, remove/demo existing equipment and remove from campus. Equipment will be removed as trade in equipment and deducted from the total dollar amount of award. 7. For each new piece of equipment, vendor is required to run/upgrade both new electric utilities from varying electrical rooms and supply additional water and drain/steam where necessary. 8. All Electrical/plumbing work must meet the Dorn VA Medical Center electrical/plumbing specifications and guidelines. All proposed work must be reviewed by the Electrical/plumbing department. 9. All equipment removed by contractor will have a trade-in allowance. Total Installation

This CLIN is impermissible. As explained in *Maybank Industries, LLC*, B-403327.3, Oct. 21, 2010, 2010 CPD ¶ 249:

The FSS program provides federal agencies a simplified process for obtaining commonly used commercial supplies and services. FAR sect. 8.401(a). Non-FSS

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supplies and services may not be purchased using FSS procedures; instead, their purchase requires compliance with applicable procurement laws and regulations, including those requiring the use of competitive procedures. When an agency announces its intention to order from an existing FSS vendor, all items quoted and ordered are required to be on the vendor's FSS contract at the time the order is issued. The sole exception to this requirement is for items that do not exceed the micro-purchase threshold of \$3,000, since such items properly may be purchased outside the normal competition requirements in any case.

Id., p. 4 (citations omitted).

Here, what is primarily at issue is the heating and plumbing work that is included in CLIN 66, described therein as: “For each new piece of equipment, vendor is required to run/upgrade both new electric utilities from varying electrical rooms and supply additional water and drain/steam where necessary.” It is clear that what is envisioned here goes far beyond any ancillary installation work; instead this section describes extensive construction activities by both mechanical and electrical contractors.

The scope of these construction activities is amplified by the Performance Based Work Statement, which on August 26, 2011 was incorporated by Modification 3 into Solicitation No. No. VA-247-11-RQ-0380. The Work statement includes, among other items, the following:

7. PRE-INSTALLATION/DEMOLITION MEETING

Prior to the start of the project, the contractor and all applicable subcontractors (including, but not limited to the demolition sub, electrical sub, mechanical sub, and flooring sub) shall attend a meeting at the time and location to be determined by the COTR and Contracting Officer prior to the start the project. Subject matter shall include, but is not limited to, safety, infection control, site access, emergency contacts, and schedule. The contractor is required to bring a detailed project/construction schedule to this meeting.

* * *

14. ALTERATIONS

Prior to the commencement of work, the Contractor, Contracting Officer and COTR shall conduct a thorough survey of all construction and/or access areas. The Contractor shall furnish a written report to the Contracting Officer to include the following.

* * *

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20. OTHER EQUIPMENT SPECIFICS:

- a. Demo Middlebury Marshall bake and roast ferris wheel oven and remove from campus. Walls and floors shall be repaired after removal. Contractor will determine best method of removal of equipment and prepare site as needed or required or by regulation. Stainless steel panels will be installed on walls formerly behind Middleby oven.
- b. Stainless steel wall panels to be installed on each side behind cook's preparation equipment will be 72" in height Floor seam will be curved to provide for adequate drainage. All seams will be sealed with commercial grade sealant.
- c. Drainage trough located in front of steam-jacketed kettles and tilt skillet will be extended ten feet Floor area will be prepared IAW applicable specifications. Current stainless steel floor covering will be removed and replaced allowing for a seamless panel running entire length between equipment described above. Trough will be sloped to allow for adequate drainage.
- d. Any wall tiles removed during demo process while removing equipment installed on walls, specifically drinking fountain will be replaced with similar tiles. No requirement to match existing tile.
- e. All floor foot pedals installed with hand sinks will be removed and wall/floor repaired.
- f. Eye wash sink (bowl type) in compliance with hospital standards will be installed in dishroom next to hand washing sink that will be replaced. Eye wash station must be separate from hand washing facilities.

* * *

26. UTILITIES SERVICES

Maintain existing utility services for Medical Center at all times. Provide temporary facilities, labor, materials, equipment, connections, and utilities to assure uninterrupted services.

* * *

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31. CONSTRUCTION SECURITY REQUIREMENTS:

a. Security Procedures:

- i. General Contractor's employees shall not enter the project site without appropriate badge. They may also be subject to inspection of their personal effects when entering or leaving the project site. Badge provision will require contractor submit employee 10 information sufficient for the VA to perform a background investigation.
- ii. For working outside the "regular hours" as defined in the contract, the General Contractor shall give 3 working days notice to the Contracting Officer so that security arrangements can be provided for the employees.
- iii. No photography of VA premises is allowed without written permission of the Contracting Officer.

Such construction work is in fact prohibited by the terms of the GSA Schedule 73 contract from which the food service equipment is being purchased under Solicitation No. VA-247-11-RQ-0380. Those GSA contract terms specifically exclude ordering construction activities as ancillary services. This apparently was recognized by the VA when it designated CLIN 66 as an "Open Market" item.

However, purchase of "Open Market" items under a GSA schedule contract order is limited to items priced below the micro-purchase threshold of \$3,000. It is apparent that the scope of the construction activities contemplated under the solicitation must far exceed the \$3,000 limit. As these include substantial electrical and mechanical activities, as well as such other work replacement of flooring and wall repairs, the cost of this "open Market" item likely in fact far exceeds \$100,000.

This issue was examined in *CourtSmart Digital Systems, Inc.*, B-292995.3, Feb. 13, 2004, 2004 CPD ¶ 79. In sustaining that protest on this issue, your office stated:

Non-FSS products and services may not be purchased using FSS procedures; instead, their purchase requires compliance with the applicable procurement laws and regulations, including those requiring the use of competitive procedures. Therefore, where, as here, an agency solicits quotations from vendors for purchase from the FSS, the issuance of a purchase order to a vendor whose quotation includes a non-FSS item priced above the micro-purchase threshold is improper.

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Id., pp. 4 - 5 (citations omitted).

To the extent that open market items are included on a GSA Schedule order, those open market items must be procured in compliance with the applicable FAR provisions associated with the estimated dollar amount of the open market items solicited. Accordingly, if the open market items exceed the micro-purchase threshold – which is certainly the case for the construction services solicited under CLIN 66 – then the agency must adhere to the FAR when soliciting those items. That includes the publication requirements of FAR Part 5; the competition requirements of FAR Part 6; the acquisition planning requirements of FAR Part 7; the market research requirements for FAR Part 10; the acquisition of commercial items requirements of FAR Part 12; and the simplified acquisition procedures of FAR Part 13. It may also include the contracting by negotiation provisions of FAR Part 15, to the extent followed by the agency in conducting its acquisition of open market items included in a GSA Schedule order.

In this case, the agency's acquisition of open market items included in a GSA Schedule order is *per se* illegal, as the agency has stated in the solicitation that *all* items (which includes both GSA Schedule items and open market items) will be evaluated and selected in accordance with FAR Part 8.4, which governs *only* the acquisition of GSA Schedule items. Since, as noted above, those open market items included in a GSA Schedule order *must* be acquired in compliance with the applicable FAR provisions, and since FAR Part 8.4 *only* governs the acquisition of GSA Schedule items, the agency's use of FAR Part 8.4 to procure open market items violates the FAR. Instead, the agency must include in its solicitation evaluation criteria and source selection plan in accordance with the requirements of FAR Part 5, FAR Part 6, Part 7, Part 10, Part 12 and Part 13 and Part 15 to the extent utilized).

For these reasons, CMARK's protest must be sustained on this ground of protest.

E. The Solicitation Contains Ambiguous and/or Undefined Requirements.

The renovation/construction project's Statement of Work ("SOW") contains several technical requirements for which the agency has not provided any drawings. For example, the successful vendor is required to develop a fire safety plan prior to commencing any construction. SOW at 5. Presumably this plan will need to include the "existing fire protection systems [and] sprinkler systems." *Id.* But the solicitation provides no information regarding these systems. The VA has failed to inform vendors where these systems are located in the facility, how they operate, and how they are to be incorporated into the required fire safety plan.

The SOW also requires the contractor to "maintain existing utility services for Medical Center at all times [as well as] temporary facilities, labor, materials, equipment, connections and

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utilities to assure uninterrupted services." *Id.* at 6.⁵ Although vendors will be required to factor this effort into their proposals, the solicitation is silent as to facility's utilities (location, usage, hook-up sites, and so on). Indeed, the VA has left vendors to guess at these requirements.

Likewise, the SOW requires the contractor to document, among other things, various alterations; condition of plumbing and electrical wiring; and

[a]ny items ***required by drawings*** to be either reused and/or relocated, found during this survey to be nonexistent, or in opinion of the [CO and COTR] to be in such condition that their use is impossible or impractical, shall be furnished or replaced by the Contractor with new items in accordance with specifications which ***will be furnished by Government***.

SOW at 6-7 (emphasis added). In other words, there are an unknown number of unidentified items required by the facility's drawings, but the VA has not provided the drawings. Once more, the solicitation leaves vendors to guess at the agency's requirements.

Contracting agencies must provide offerors with sufficient detail in a solicitation to enable them to compete intelligently and on a relatively equal basis. *AirTrak Travel et al.*, B-292101 et al., June 30, 2003, 2003 CPD ¶ 117 at 14 (citing *National Customer Eng'g*, B-254950, Jan. 27, 1994, 94-1 CPD ¶44 at 5. GAO has frequently applied this long-standing principle. For example, in *Haworth, Inc.*, B-256702, et al., Sept. 9, 1994, 94-2 CPD ¶ 98,

The determination of the agency's minimum needs and which products on the FSS meet those needs is properly the agency's responsibility, thus requiring that the agency need only have a reasonable basis in determining the technical acceptability of an FSS product. See *American Body Armor & Equip., Inc.*, B238860, July 3, 1990, 90-2 CPD ¶ 4. Nevertheless, where, as here, an agency's request for quotations invites competition, vendors must be given sufficient detail to allow them to compete intelligently and on a relatively equal basis; the agency's description of its needs must be free from ambiguity and describe the agency's minimum needs accurately. See *Nautica Int'l, Inc.*, B-254428, Dec. 15, *287 1993, 93-2 CPD ¶ 321. This means that the agency has an obligation to describe its needs accurately, so that all vendors may compete on a common basis, since the agency must treat vendors consistent with the concern for a fair and equitable competition that is inherent in any procurement, e.g., where an RFQ does not accurately reflect the agency's needs, it should be amended so that all offerors can

⁵ We note that, like the equipment discussed in section V. B. above, the provision of utility services is not on any eligible vendor's FSS contract.

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compete on a fair and equal basis. *Dictaphone Corp.*, B-254920.2, Feb. 7, 1994, 94-1 CPD ¶ 75.

Id. at 5-6.

The same rationale applies here. The VA's RFQ is riddled with unclear and ambiguous requirements such that no vendor can compete intelligently. Therefore, this protest must be sustained.

VI. REQUEST FOR DOCUMENTS

Pursuant to 4 C.F.R. § 21.3 (d), CMARK requests that the agency file with its agency report the documents required by 4 C.F.R. § 21.3 (d), and also produce the following relevant documents, including but not limited to e-mails and e-mail attachments.

1. The complete proposals of all offerors. These documents are relevant because CMARK has challenged the propriety of the solicitation on grounds that will be supported by a review of the proposals from the other offerors.
2. All documents relating to the agency's determination of the brand name products and the salient characteristics contained in the solicitation for those products. CMARK has challenged the propriety of the descriptions of salient characteristics utilized by the VA, and these documents are related to that protest ground.
3. All documents relating to the agency's decision to award this as an open GSA schedule buy. CMARK has challenged the propriety of the VA's failure to give priority to veteran-owned small businesses, and these documents are related to the validity of VA's action.
4. All documents relating to any planning by the VA for the construction activities contained in CLIN 66 and the Work Statement, to include any estimate by the VA of the costs of such work. These documents are relevant because CMARK has challenged the procurement of such activities under a GSA schedule purchase.

VII. RESERVATION OF RIGHT TO REQUEST A HEARING

CMARK does not believe at this time that a hearing will be required, but reserves its right to request a hearing in the future after reviewing the agency report.

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VIII. RELIEF REQUESTED

CMARK requests that the Comptroller General grant this protest and recommend that the U.S. Department of Veterans Affairs cancel this solicitation and issue a revised solicitation of meeting all legal requirements, first setting aside the acquisition for competition restricted to SDVOSB concerns. CMARK requests the Comptroller General award CMARK its costs of pursuing this protest, including, but not limited to, its reasonable attorneys' fees and such other relief as GAO deems just and appropriate.

Respectfully submitted,



Victor G. Klingelhofer
William J. Bainbridge

COHEN MOHR LLP

Counsel for CMARK Construction, Inc.

cc: David Thomas (david.thomas69e89@va.gov and fax (803) 695-6769)

November 8, 2011
Attachment C – VA Response to GAO on Aldevra B-406056

From: Kulish, Dennis [<mailto:Dennis.Kulish@va.gov>]
Sent: Friday, October 28, 2011 7:23 AM
To: ribacks@gao.gov
Cc: Foley, Dennis; rodney@aldevra.com; Protests
Subject: Aldevra B-406056

Scott H. Riback, Esq.
GAO Procurement Law Control Group
441G Street, NW
Washington , DC 20548

Re: B-406056

Attorney Riback:

We are in receipt of the referenced protest filed by Aldevra.

Please be advised that the US Dept. of Veterans Affairs will not be following the recommendations from GAO in the Aldevra protests B-405271; B-405524.

It is my understanding your Agency will be receiving the official, much more detailed VA position on this in the near future. Since the referenced protest seems to be the same issue covered by the previous protests, at this time we will not be filing an Agency Report in this referenced matter .

To the extent you need an Agency legal contact in this matter please feel free to contact Dennis Foley, Esq. in our Washington DC office at 202 461 4998 or myself at 814 940 6640.

Thank you.

Dennis J. Kulish
Office of Regional Counsel

CC Dennis Foley, Esq.
Rodney Marshall-Aldevra

November 7, 2011

Attachment C - Email From Mr Wayne A Simpson

From: Simpson, Wayne A. (OAL)
Sent: Monday, October 17, 2011 5:29 PM
To: Simpson, Wayne A. (OAL)
Subject: *****AN IMPORTANT MESSAGE FROM VA's SENIOR PROCUREMENT EXECUTIVE*****
Importance: High

This message is sent on behalf of Mr. Jan R. Frye, Deputy Assistant Secretary for Acquisition and Logistics, and VA's Senior Procurement Executive. Please forgive any cross-postings as multiple mail groups are being used to ensure maximum distribution to all VA acquisition and procurement officials/personnel. Please feel free to distribute to other VA personnel who need-to-know this information. **This message is for internal VA use only.** Mr. Frye's message begins below:

=====

October 17, 2011

TO: All VA Acquisition and Procurement Officials/Personnel

SUBJ: Recent Government Accountability Office Decision Involving the Use of the Federal Supply Schedule Program vs. VA's Veterans First Contracting Program

1. On January 7, 2010, VA implemented those portions of the Veterans Benefits, Health Care, and Information Technology Act of 2006, Sections 502 and 503 of Public Law 109-461 (the Act) providing opportunities for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) and Veteran-Owned Small Businesses (VOSBs) to increase their federal contracting and subcontracting (74 Federal Register 64619 (December 8, 2009)). Under this final rule, commonly referred to in VA as the "Veterans First Contracting Program," a VA contracting officer may restrict competition to contracting with SDVOSBs or VOSBs under certain conditions. Likewise, sole source contracts with SDVOSBs or VOSBs are permissible under certain conditions. This final rule implemented these special acquisition methods as a change to the VA Acquisition Regulation (VAAR). Therein, in response to public comments and to a comment from the General Services Administration as to the applicability of the VA's new SDVOSB/VOSB set-aside program to acquisitions conducted pursuant to the Federal Supply Schedule, VA responded that the law and VA's implementing regulations do not apply to FSS procurements

2. Nevertheless, the Government Accountability Office (GAO) issued a bid protest decision October 11, 2011, in the case of Aldevra, a SDVOSB, case number B-405271 and B-405524, which recommends VA take corrective action on two acquisitions conducted pursuant to FAR Subpart 8.4, Federal Supply Schedule. The corrective action would require VA to conduct market research to determine if two or more

SDVOSBs could perform the work, and, if so, setting-aside the acquisition for SDVOSBs on the open market based on GAO's interpretation of the VAAR, before VA could use the Federal Supply Schedules Program. VA is of the opinion GAO's interpretation is flawed and legally incorrect.

3. The United States Supreme Court ruled in 1986 the Comptroller General is an officer of the Legislative Branch (see *Bowsher v. Synar*, 478 U.S. 714, 727-32), holding the Comptroller General is subject to the control of Congress and therefore may not exercise non-legislative power. Because GAO is part of the Legislative Branch, Executive Branch agencies are not bound by GAO's legal advice.

4. Therefore, VA determined this GAO recommendation, Aldevra, B-405271 and B-405524, dated October 11, 2011, shall not be followed. We expect this issue ultimately will be decided by the courts. Therefore, VA acquisition and procurement professionals are to continue using the Federal Supply Schedules Program, when necessary and appropriate. The GAO recommendation does not change how VA will acquire goods and services in support of its mission.

5. *Please do not reply to this e-mail message.* Questions regarding this matter should be directed to your respective District Counsel or head of contracting activity. Thank you.

Jan R. Frye
Deputy Assistant Secretary for
Acquisition and Logistics



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

Decision

Matter of: Aldevra
File: B-405271; B-405524
Date: October 11, 2011

Rodney Marshall, for the protester.
Brian R. Reed, Esq., and Dennis J. Kulish, Esq., Department of Veterans Affairs, for the agency.
Jacqueline Maeder, Esq., and Scott H. Riback, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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.

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 conduct such research, and subsequently to 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).¹

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 819.7008², the contracting officer shall set aside an acquisition for competition restricted to SDVOSB concerns upon a reasonable expectation that:

¹ 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.

² 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
(continued...)

(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 its requirements under solicitation 179-0306, but the record shows that the agency's purchasing agent determined to meet the requirement using the FSS without first conducting any market research to determine the availability of SDVOSBs to perform the requirement.

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.³ 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; cf. Powerhouse Design Architects & Eng'rs, Ltd., B-403175, et al., Oct. 7, 2010, 2010 CPD ¶ 240 (provisions of VA Act take priority requirements of Brooks Act).

(...continued)

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

³ 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.

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 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 requirement, it must set it aside exclusively for SDVOSB concerns.⁴

In our view, the discussion above disposes of the question raised by these protests. 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.

⁴ 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.

Response: We disagree with the commenter and reject the suggestion because this rule does not apply to FSS task or delivery orders. VA 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).⁵ 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.⁶

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).⁷ 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).

⁵ 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.

⁶ 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.

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

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

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 programs⁸) 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 2006.⁹

⁸ 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)).

⁹ 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 also are contemplated under the 2006 statute.

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 reasonable market research regarding its requirements under solicitation 179-0306, 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 claim 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