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VETERANS
ADMINISTRATION
PROCUREMENT

Protests Concerning
Service-Disabled Veteran-
Owned Small Business
Preferences Sustained

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U.S. Government Accountability Office

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Highlights of [GAO-12-278T](#) a testimony before Subcommittees on Oversight and Investigation and Economic Opportunity, Committee on Veterans' Affairs, House of Representatives

GAO's Role Under The Competition in Contracting Act

Under the Competition in Contracting Act of 1984, GAO is required to consider protests filed by interested parties concerning the terms of solicitations or contract awards. In deciding protests, GAO makes a determination of whether the agency's actions complied with procurement statutes and regulations. Aldevera, an SDVOSB concern, argued that two solicitations issued by the Veterans Administration should have been set aside for SDVOSB concerns.

GAO's Recommendations

GAO recommended, for the solicitation where the record showed that two or more SDVOSBs were capable of meeting the agency's requirements at a fair and reasonable price, that the VA cancel the solicitation and obtain its requirements using an SDVOSB set-aside. GAO also recommended, for the solicitation where the record did not indicate whether there were two or more SDVOSBs capable of meeting the agency's requirements at a fair and reasonable price, that the VA conduct reasonable market research regarding its requirements. If the VA determines that there is a reasonable expectation of receiving offers from two or more SDVOSB concerns capable of performing the requirements at a fair and reasonable price, we recommended that the VA cancel the solicitation and re-solicit its requirements using an SDVOSB set-aside.

View [GAO-12-278T](#). For more information, contact Ralph White at 202-512-8278 or whitero@gao.gov.

November 2011

VETERANS ADMINISTRATION PROCUREMENT

Protests Concerning Service-Disabled Veteran-Owned Small Business Preferences Sustained

GAO's Findings

The Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128 (2006) (the 2006 Act) provides in relevant part that the Department of Veterans Affairs (VA) must set aside procurements for Service-Disabled Veteran-Owned Small Business (SDVOSB) concerns if the contracting officer has a reasonable expectation of receiving offers from two or more SDVOSB concerns and that award can be made at a fair and reasonable price that provides the best value to the government.

Aldevera, an SDVOSB concern, challenged the terms of two solicitations issued by the VA for kitchen equipment. In both protests, Aldevera argued that the VA should have restricted the competitions to SDVOSB concerns, instead of issuing the solicitations for competition under the General Services Administration's (GSA) Federal Supply Schedule (FSS). In its response to the protest, VA argued that the SDVOSB set-aside requirements of the 2006 Act did not apply to the FSS.

In a decision issued by our Office, GAO concluded that the 2006 Act applies to the FSS.

Accordingly, GAO sustained the protests. The decision is available at: <http://www.gao.gov/decisions/bidpro/405271.pdf>.

Chairman Johnson, Chairman Stutzman, Ranking Members, and Members of the Subcommittees:

Thank you for the opportunity to be here today to discuss the bid protest decision recently issued by the Government Accountability Office (GAO) in response to two protests challenging the issuance of solicitations by the Department of Veterans Affairs (VA). This decision addressed the statutory preference for setting aside VA procurements for Service-Disabled Veteran-Owned Small Business (SDVOSB) concerns.

GAO provides an objective, independent, and impartial forum for the resolution of disputes concerning the awards of federal contracts. Since 1984, the Competition in Contracting Act (CICA) has established statutory authority for GAO's bid protest function. GAO has issued implementing regulations establishing the procedural framework for our bid protest forum in Title 4, Part 21, of the Code of Federal Regulations.

In Fiscal Year 2011, we received 2,353 bid protests challenging procurements across the federal government. The bid protest process is a legal one, and both the process and the resulting product differ from those associated with the reports that GAO issues in connection with its program audits and reviews. Protests are handled solely by GAO's Office of General Counsel (OGC), not by its audit teams. In developing the record, OGC provides all parties—the protester, the awardee, and the contracting agency—an opportunity to present their positions. In some cases, OGC conducts a hearing to further develop the record. Under CICA, as amended, we have 100 calendar days to decide a protest.

The product of a GAO protest—our legal decision—does not address broad programmatic issues such as whether or not a particular government program is being managed effectively or consistent with best practices. Instead, our bid protest decisions address specific allegations challenging particular procurement actions as contrary to procurement laws, regulations, and the evaluation scheme set forth in the solicitation. We sustain a protest when we find that the procuring agency has not complied with procurement laws, regulations, or the solicitation's evaluation scheme, and that the violation prejudiced the protester's chances of winning the contract.

With that background, my testimony today will summarize our recently issued decision concerning challenges to the VA's interpretation of the statutory requirement that VA set aside procurements for SDVOSB concerns.

Background

Our decision concerns two protests filed by Aldevra, an SDVOSB. The first protest, which was received on July 1, 2011, challenged the terms of solicitation No. VA-69D-11-RQ-1170 for a tilting skillet/braising pan and one countertop electric griddle for the Federal Health Care Center in Chicago, Illinois. The second protest, which was received on August 12, challenged the terms of solicitation No. 693-11-4-179-0306, for two griddles and one food slicer for the VA Medical Center in Wilkes-Barre, Pennsylvania. Our decision of October 11 addressed both protests by the 100-day deadline for the first protest.

The VA issued both solicitations under the Federal Supply Schedule (FSS), which is a program consisting of contracts administrated by the General Services Administration that is available for all Executive Branch agencies to use in their procurements. The solicitations here were not restricted to SDVOSB concerns, or concerns under any other socio-economic program.

The Legal Standard

The sole issue raised by Aldevra was whether the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128 (2006) (the 2006 VA Act), required the VA to conduct market research to determine whether the VA should set aside the procurements for SDVOSB concerns before using the FSS to satisfy its requirements.

In relevant part, the 2006 Act 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 shall be given to SDVOSB concerns, followed by veteran owned small businesses (VOSBs).

A regulation issued by the VA implementing the 2006 Act similarly stated that a contracting officer “shall” set aside a procurement for SDVOSBs (or VOSBs) if there is a “reasonable expectation” that offers will be received from two or more SDVOSB (or VOSB) concerns, and award will be made

at a reasonable price. Veterans Administration Acquisition Regulation (VAAR), 48 C.F.R. § 819.7005(a) (2011).

The VA argued that, notwithstanding the statutory language in the 2006 Act, the agency is not required to conduct market research to determine whether SDVOSBs (or VOSBs) are capable of performing the requirement if the VA instead chooses to procure its requirements through the FSS. In support of its position, the VA cited provisions of Federal Acquisition Regulation (FAR) part 19.14, which states that agencies “may” set aside procurements for SDVOSBs if they have an expectation of receiving two or more offers from SDVOSB concerns capable of performing the requirements at a fair and reasonable price. As relevant to the protests—and the VA’s response to the protests—FAR part 8.4 states that the small business set-aside rules under FAR part 19—including SDVOSBs—do not apply to the FSS.

GAO’s Review of the Record

Our Office reviewed the language of the 2006 Act, as well as the FAR provisions cited by the VA. We concluded that the 2006 Act plainly states that the VA “shall” set aside procurements for SDVOSB (or VOSB) concerns if it determines that there is a reasonable expectation of receiving offers from two or more SDVOSB (or VOSB) concerns capable of performing the requirements at a fair and reasonable price. This statutory language takes precedence over any regulatory language to the contrary.

Moreover, the FAR provisions cited by the VA, which state that agencies “may” consider using an SDVOSB set-aside, were implemented to meet the statutory requirements of the Veterans Benefit Act of 2003, 15 U.S.C. § 657f (2006) (the 2003 Act), which applies government-wide. The 2006 Act, however, is a separate statutory authority codified within the statutes that govern the VA (i.e., Title 38 of the U.S. Code) that applies only to the VA.

Thus, the FAR provisions, which state that agencies “may” set aside procurements for SDVOSBs, and which are also exempt under the FSS from the provisions of FAR part 19.14, do not apply to the VA, because the VA is governed by the later-enacted and VA-specific 2006 Act, and not the 2003 Act, which applies government-wide. Put differently, the VA is subject to procurement rules concerning SDVOSBs that do not apply to any other Executive Branch agency.

For the record, our decision does not state that the VA must set aside every competition for SDVOSB (or VOSB) concerns. Instead, our decision states that the VA must first conduct market research to

determine whether it will receive offers from two or more SDVOSB (or VOSB) concerns. If the VA concludes that there is a reasonable expectation of receiving offers from two or more SDVOSB (or VOSB) concerns capable of performing the requirements at a fair and reasonable price, the agency must set aside the procurement for SDVOSBs (or VOSBs). If the VA concludes that there is not a reasonable expectation of receiving offers from two or more SDVOSB (or VOSB) concerns capable of performing the requirements at a fair and reasonable price, it may use any other authorized procurement method.

Recommendation

Based on our review of the record, we sustained the protests. For the first solicitation, the VA conceded that there were two or more SDVOSB concerns capable of performing its requirements at a fair and reasonable price. GAO therefore recommended that the VA cancel the first solicitation and re-solicit its requirements using an SDVOSB set-aside. For the second solicitation, the record did not address whether there were two or more SDVOSB concerns capable of performing the requirements at a fair and reasonable price. GAO therefore recommended that the VA conduct market research regarding its requirements for that solicitation. If the VA determines that there is a reasonable expectation of receiving offers from two or more SDVOSB concerns capable of performing the requirements at a fair and reasonable price, we recommended that the VA cancel the solicitation and re-solicit its requirements using a SDVOSB set-aside. We also recommended that the agency reimburse the protester the costs of filing and pursuing the protests.

Under CICA, a GAO decision sustaining a protest results in a recommendation. The statute gives agencies 60 days to implement a GAO recommendation. In the event an agency does not implement a GAO recommendation, the agency must advise GAO within 5 days after the conclusion of the 60-day period. In the event an agency advises it will not follow a GAO recommendation, CICA requires GAO to advise the Congress of the agency's decision.

Here, the VA has until December 15, 2011, to respond to our recommendation. As of today, the VA has not yet responded.

Chairman Johnson, Chairman Stutzman, this concludes our prepared statement. I would be happy to respond to any questions regarding our bid protest decisions that you or other Members of the Subcommittees may have.

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