



United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Aldevra  
**File:** B-406205  
**Date:** March 14, 2012

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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.

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### 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.

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### 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,<sup>1</sup> 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.

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<sup>1</sup> 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),<sup>[2]</sup> 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

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<sup>2</sup> 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).<sup>[3]</sup>

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.<sup>4</sup> For these reasons, and due to Aldevra's uncontroverted representations that it is a verified SDVOSB concern that sells the item being

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<sup>3</sup> 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).

<sup>4</sup> 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.<sup>5</sup>

#### 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

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<sup>5</sup> 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.<sup>6</sup>

#### 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.<sup>7</sup> 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:

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<sup>6</sup> 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).

<sup>7</sup> 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