



Decision

Matter of: Veterans4You, Inc.

File: B-417340; B-417340.2

Date: June 3, 2019

Sarah Reida, Esq., Legal Meets Practical, LLC, for the protester. Craig D. Barrett, Esq., for the Government Publishing Office; and Steven Devine, Esq., Department of Veterans Affairs, for the agencies. Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging terms of solicitation issued by Government Publishing Office to acquire suicide prevention gun locks on behalf of the Department of Veterans Affairs that fails to implement the requirements of the Veterans Benefits, Health Care, and Information Technology Act of 2006 is sustained where record shows that acquisition is being conducted without regard to that Act's requirements relating to reserving contracting opportunities for service-disabled veteran-owned small businesses or veteran-owned small businesses.

DECISION

Veterans4You, Inc. (V4Y), of Fort Lauderdale, Florida, protests the terms of invitation for bids (IFB) No. 19-00138/011992, issued by the Government Publishing Office (GPO) to acquire, on behalf of the Department of Veterans Affairs (VA), a quantity of suicide prevention gun locks. V4Y argues that the solicitation improperly fails to give preference to service-disabled veteran-owned small businesses (SDVOSBs) or veteran-owned small businesses (VOSBs).

We sustain the protest.

The solicitation is for the acquisition of a quantity of suicide prevention gun locks to be distributed by the VA through a program known as the Veterans Crisis Line.¹

¹ See https://www.mentalhealth.va.gov/suicide_prevention/veterans-crisis-line.asp (last visited June 3, 2019).

Essentially, the gun locks are comprised of a cable and key-activated padlock mechanism that can be used on virtually any handgun, rifle, or shotgun to prevent rounds from being chambered, magazines from loading and engaging, or cylinders on guns from moving. In addition to the mechanism itself, the IFB requires the padlock portion of the device to have a vinyl coating imprinted with the Veterans Crisis Line logo and contact information; a wrap-around sticker that is to be affixed to the cable portion of the device that also has the Veterans Crisis Line logo and contact information; and a wallet card that has the Veterans Crisis Line logo and contact information, as well as information identifying signs of suicide risk. IFB at 3, 9-11.

Because this acquisition was designated by the VA as a printing requirement rather than as an acquisition of suicide prevention gun locks, the VA sent a requisition to the GPO requesting that GPO acquire the gun locks on behalf of the VA. Agency Report (AR) exh. 8, Printing and Binding Requisition. GPO, in turn, issued the IFB on what GPO describes as a competitive basis pursuant to the provisions of GPO's distinct acquisition authority to provide and procure printing services on behalf of the government. 44 U.S.C. §§ 501-502; see also GPO Publication 305.3 (rev. 4-14) Printing Procurement Regulations (PPR).

DISCUSSION

V4Y argues that the VA, through the GPO, improperly is acquiring the suicide prevention gun locks without consideration of the requirements of the Veterans Benefits, Health Care, and Information Technology Act of 2006 (the VBA) 38 U.S.C. §§ 8127-8128. That act requires VA to reserve acquisitions for SDVOSBs or VOSBs where the VA determines that there is a reasonable expectation that two or more eligible concerns will submit offers, and that award can be made at a fair and reasonable price that offers the best value to the government. 31 U.S.C. § 8127(d). V4Y argues that this statute imposes a requirement for VA to determine whether there are two or more concerns (SDVOSBs or VOSBs) that can meet the agency's needs for suicide prevention gun locks.²

² The protester argues in the alternative that, as a practical matter, the acquisition here is not for printing services but, rather, for suicide prevention gun locks, and that printing is only a tangential requirement. V4Y therefore argues that it is not appropriate for the acquisition to be conducted by GPO using its printing acquisition authority. In support of its position, V4Y points out that the solicitation itself acknowledges that printing is not the predominant element of this requirement. In this connection, the IFB provides: "The predominant production function is determined to be other than presswork." IFB at 1.

We need not determine whether this acquisition is for printing services and, correspondingly, whether GPO's printing acquisition authority is properly being utilized. As discussed below, we conclude that, even where GPO's printing acquisition authority is being used to acquire goods or services on behalf of the VA, the requirements of the VBA still apply.

Both the VA and the GPO argue that the requirements of the VBA--to set the acquisition aside for SDVOSBs or VOSBs should the VA determine that two or more eligible concerns can meet the agency's needs at a fair and reasonable price--are inapplicable to the subject acquisition because the requirement is being fulfilled under GPO's independent acquisition authority, 44 U.S.C. §§ 501-502. According to both agencies, where printing services are being acquired, agencies such as the VA are required by statute to meet those requirements through GPO. 44 U.S.C. §§ 501-502. Both agencies therefore argue that only the statutes and regulations applicable to GPO's conduct of an acquisition apply, and that GPO is not required to give consideration to whether there are two or more SDVOSBs or VOSBs capable of meeting the requirement.

We agree with the protester that the requirements of the VBA are applicable to the subject acquisition and therefore sustain the protest. We discuss our conclusions in detail below.

The overarching requirement for the VA to set aside acquisitions for SDVOSBs or VOSBs is found in 38 U.S.C. § 8127(d), which provides as follows:

Except as provided in subsections (b) and (c) [which pertain to certain small acquisitions not relevant here], for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department [of Veterans Affairs] shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans or small business concerns owned and controlled by veterans with service-connected disabilities if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans or small business concerns owned and controlled by veterans with service-connected disabilities will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

This provision embodies what often is referred to as the "rule of two," that is, where the VA determines--typically through performing market research--that there is a reasonable expectation that at least two eligible concerns will submit proposals, and that award can be made at a fair and reasonable price, the VA is required to set aside the acquisition for eligible concerns.

This basic statutory provision has been interpreted by the Supreme Court (as well as our Office) as requiring the VA to determine in every acquisition: (1) whether there is a reasonable expectation that at least two eligible concerns will submit proposals (or in this case, bids) responsive to the agency's requirements; and (2) whether award can be made at a fair and reasonable price. Kingdomware Technologies, Inc. v. United States, 136 S.Ct. 1969, 1976 (2016) ("On the merits, we hold that § 8127 is mandatory, not discretionary. Its text requires the Department [VA] to apply the Rule of Two to all contracting determinations and to award contracts to veteran-owned businesses."); see

also Aldevra, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶ 183 at 3 (“Thus, contrary to the agency’s [VA’s] position, the VA Act requires, without limitation, that the agency conduct its acquisitions using SDVOSB [or VOSB] set-asides where the necessary conditions are present.”).

Section 8128(a) of the same statute also provides for mandatory use of SDVOSB or VOSB set-asides where the necessary conditions are present, even where other statutes may apply. That provision states as follows:

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.³

38 U.S.C. § 8128(a) (emphasis supplied). This statutory provision was expressly considered in a recent case decided by the Court of Appeals for the Federal Circuit in which the Court was considering the interrelationship between the VBA and another mandatory statutory provision, the Javits-Wagner-O’Day (JWOD) Act. 41 U.S.C. § 8501-8506. The JWOD Act includes a mandatory requirement for federal agencies to acquire goods and services from qualified nonprofit agencies for the blind or severely disabled. Notwithstanding the mandatory nature of the JWOD Act’s requirements, the Court found that the terms of 38 U.S.C. § 8128(a) required that the VA procure all goods and services from SDVOSBs or VOSBs where the VA’s research shows that the rule of two is satisfied, even where the procurement in question would otherwise be governed by the mandatory requirements of the JWOD Act. Specifically, the Court stated as follows:

Indeed, under § 8128(a), the Secretary of Veterans Affairs, when “procuring goods and services pursuant to a contracting preference under [title 38] *or any other provision of law ... 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) (emphases added). The phrase “or any other provision of law” by its terms encompasses the JWOD.

PDS Consultants, Inc. v. United States, 907 F.3d 1345, 1360 (Fed.Cir. 2018) (emphasis in original).

³ We note that 38 U.S.C. § 8128(b) defines a “small business concern owned and controlled by veterans” as a small business concern that is included in the small business database maintained by the Secretary of VA under 38 U.S.C. § 8127(f). That database, in turn, is defined to include small businesses that are both SDVOSBs and VOSBs. 38 U.S.C. § 8127(f)(1). Thus, as a practical matter, the provisions of 38 U.S.C. § 8128(a) apply equally to SDVOSBs and VOSBs.

Turning to the current case, the position of the GPO and VA may be summarized as follows: (1) VA is acquiring printing services, as opposed to suicide prevention gun locks; (2) the VA is required, under the mandatory terms of GPO's acquisition authority, to acquire printing services exclusively through GPO; (3) GPO's acquisition authority is distinct from any other acquisition authority under which VA may acquire goods or services; (4) GPO's acquisition authority does not contemplate restricting competition to SDVOSBs or VOSBs; and (5) because this acquisition is being conducted by GPO under its unique, mandatory statutory authority rather than by VA under any other statutory authority, there is no requirement for the VA to make the determinations required under the VBA. We disagree.

As the discussion above demonstrates, the requirement for VA to determine whether there are at least two eligible concerns capable of meeting its requirements at a fair and reasonable price consistently has been interpreted by both our Office and the courts as both mandatory, and of universal application.⁴ We reach that same conclusion here with respect to the applicability of the VBA to all VA printing acquisitions, especially in view of the express provisions of 38 U.S.C. § 8128(a), which states in no uncertain terms that: "In procuring goods and services pursuant to . . . any other provision of law, the Secretary shall give priority to a small business concern owned and controlled by veterans." Simply stated, any time the VA is acquiring goods or services--without limitation--it is required to determine whether there are at least two SDVOSBs or VOSBs capable of meeting the agency's requirements at a fair and reasonable price.

Our conclusion here is supported by yet another provision of the VBA. That provision, 38 U.S.C. § 8127(i)⁵, states as follows:

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

⁴ In two decisions issued by our Office, we reached a conclusion that differed from the conclusion reached by the Court of Appeals for the Federal Circuit concerning the interrelationship of the JWOD and the VBA. Alternative Contracting Enterprises, LLC; Pierce First Medical, B-406265 et al., Mar, 26, 2012, 2012 CPD ¶ 124; Pierce First Medical; Alternative Contracting Enterprises, LLC--Recon., B-406291.3, B-406291.4, June 13, 2012, 2012 CPD ¶ 182 (request for reconsideration denied). In light of the Court's decision in PDS Consultants, Inc. v. United States, supra., those cases are no longer controlling.

⁵ This provision was added after the original VBA was enacted. Pub. L. No. 110-389, § 806, Oct. 10, 2008, 122 Stat 4145.

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

Both the VA and the GPO argue that this statutory provision is inapplicable to the current situation because they have not entered into an “interagency acquisition” as that term is defined in the Federal Acquisition Regulation (FAR) §§ 2.101, 17.502-1. We disagree.

We see no basis to conclude that this statute is inapplicable here. Contrary to the position taken by the VA and GPO, this statute is not limited to interagency acquisition agreements as that term is defined in the FAR. The statute on its face applies to “a contract, memorandum of understanding, agreement, or any other arrangement with any governmental entity. . . .” 38 U.S.C. § 8127(i). The statute thus goes beyond “interagency acquisitions” and includes any “agreement or other arrangement.” In addition, and again contrary to the position of the agencies, we see no reason to conclude that the statute is inapplicable to GPO, an organization that fits squarely within the definition of “any governmental entity.”

Here, there is no showing in the record that VA made any attempt to advise GPO of its unique requirements or to have the requirements of the VBA implemented during GPO’s performance of the acquisition on VA’s behalf. The VA’s printing and binding requisition submitted to GPO, AR, exh. 8, makes no mention of the requirements of the VBA, and makes no attempt to seek GPO’s cooperation in implementing the statute’s requirements. There also is no showing in the record that GPO, on its own initiative, gave any consideration to the requirements of the VBA when announcing the acquisition or issuing the solicitation.

Because we conclude that the terms of 38 U.S.C. § 8127(i) apply to the current arrangement between VA and GPO, we also find that VA was required to—but did not—alert GPO to its unique requirements, and to have any acquisition performed by GPO on VA’s behalf implement, to the maximum extent feasible, those requirements of the VBA discussed above.

As a final matter, and for the record, we note that GPO’s own procurement regulations (the PPR) include a mechanism for VA to have advised GPO of its unique requirements. GPO’s PPR expressly contemplates that acquiring agencies may request that a particular acquisition be confined to a specific category of contractors. GPO’s PPR provides as follows:

Occasionally a requisition will contain a request to include a particular contractor or to restrict bidding to a specific category of contractors (e.g., small business or minority-owned firms). In such circumstances, where these requests cannot be fully accommodated, the Contracting Officer should: (i) determine the origin and reasons for such requests, (ii) explain GPO’s obligation to employ competitive bidding, (iii) indicate what efforts will be made to satisfy the spirit of the request (e.g., including such contractors on the bid list), and (iv) encourage agencies to recommend

additional firms that could be furnished questionnaires and thus become potential bidders. In no case should these requests be disregarded. If agreement with the agency cannot be reached, it should be brought to the attention of the appropriate APS [agency procurement services] Director for resolution.

GPO PPR, Chapter VIII, Section 1.7(f). As noted, there is no evidence to show that VA requested that this acquisition be confined to SDVOSBs or VOSBs, or that GPO considered such a request in light of the requirements of the VBA and the nature of its acquisition authority. Based on these considerations, we sustain V4Y's protest.

RECOMMENDATION

We recommend that GPO coordinate its efforts with the VA to meet the VA's requirement for suicide prevention gun locks so as to give effect to the requirements of the VBA, as discussed in detail above. We leave it to the agencies to determine the specific nature of their respective actions necessary to implement our recommendation. Finally, we recommend that GPO reimburse V4Y the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the GPO within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel