



Decision

Matter of: Pierce First Medical; Alternative Contracting Enterprises, LLC--
Reconsideration

File: B-406291.3; B-406291.4

Date: June 13, 2012

Chet McLendon for Pierce First Medical and Louis N. Leon-Guerrero for Alternative Contracting Enterprises, LLC, the protesters.

Tricia A. Leminger, Esq., and Stephen Starks, Esq., Kroger, Gardis & Regas, LLP, for Bosma Industries for the Blind, Inc., the intervenor.

Dennis Foley, Esq., Department of Veterans Affairs; and Dennis Lockard, Esq., Committee for Purchase From People Who Are Blind or Severely Disabled, for the agencies

Nora K. Adkins, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protesters' requests to reconsider our decision denying their protests are denied where the requests merely express disagreement with the prior decision, reiterate arguments made previously, and raise new arguments that could have been made during the course of the underlying protests.

DECISION

Pierce First Medical (PFM), of Phoenixville, Pennsylvania, and Alternative Contracting Enterprises, LLC (ACE), of Tucson, Arizona, request reconsideration of our decision in Alternative Contracting Enterprises, LLC; Pierce First Medical, B-406265 et al., Mar. 26, 2012, 2012 CPD ¶ 124, in which we denied these firms' protests against the issuance of purchase orders under two basic ordering agreements to Bosma Industries for the Blind, Inc., of Indianapolis, Indiana, by the Department of Veterans Affairs (VA), for medical exam and surgical gloves.

We deny the requests for reconsideration.

The protesters filed several protests with our Office challenging the agency's award of various purchase orders to Bosma, arguing that the VA failed to first consider whether these procurements should have been set aside for service-disabled,

veteran-owned small business (SDVOSB) or veteran-owned small business (VOSB) concerns in accordance with the Veterans Benefits, Health Care, and Information Technology Act of 2006 (the VA Act), 38 U.S.C. §§ 8127-8128 (2006), before purchasing the items from Bosma under the Javits-Wagner-O'Day (JWOD) Act.¹ 41 U.S.C. §§ 8501-8506 (2011). The protests also asserted that the gloves provided to the VA by Bosma are made in the People's Republic of China in violation of the Buy American Act.²

In our decision, we found that the VA reasonably read the VA Act and the JWOD Act together to harmonize the two statutes, where each had mandatory language concerning set-aside preferences for SDVOSB or VOSB contractors, and AbilityOne contractors, respectively. We therefore concluded that the VA appropriately issued sole-source purchase orders to Bosma, an AbilityOne nonprofit vendor, for items that were on the AbilityOne procurement list, even though SDVOSB concerns indicated that they could provide the gloves. We also noted that we do not review decisions of the Committee for Purchase from People Who are Blind or Severely Disabled to add or delete a commodity or service from the AbilityOne procurement list, and that the Buy American Act did not provide a basis for challenging the VA's sole-source purchase orders from the AbilityOne list.

Both protesters have requested reconsideration of our prior decision on the basis that the decision was legally flawed. Our Bid Protest Regulations require that a party requesting reconsideration must show that our prior decision contains errors of either fact or law, or must present information not previously considered that warrants reversal or modification of our decision. Bid Protest Regulations, 4 C.F.R. § 21.14(a) (2012); Department of Housing and Urban Dev.--Recon., B-279575.2, Nov. 4, 1998, 98-2 CPD ¶ 105 at 2; Department of the Army--Recon., B-271492.2, Nov. 27, 1996, 96-2 CPD ¶ 203 at 5. Information not previously considered means information that was not available to the protester when the initial protest was filed. Allstate Van & Storage, Inc.--Recon., B-270744.2, Aug. 20, 1996, 96-2 CPD ¶ 72 at 2. Failure to make all arguments or submit all information available during the course of the initial protest undermines the goals of our bid protest forum--to produce fair and equitable decisions based on consideration of both parties' arguments on a fully developed record--and cannot justify reconsideration of our prior decision. The Dep't of the Army--Recon., B-237742.2,

¹ The AbilityOne program, which is administered by the Committee for Purchase from People Who Are Blind or Severely Disabled, implements the JWOD Act by providing employment opportunities for people who are blind or have other severe disabilities through the award of federal contracts. 41 C.F.R. § 51-1.3 (2011).

² The protesters raised numerous other challenges to the VA's issuance of the purchase orders to Bosma. While our decision discussed only the more significant arguments in resolving the protests, we considered all of the parties' arguments.

June 11, 1990, 90-1 CPD ¶ 546 at 4. In addition, our Office will not consider a request for reconsideration based on repetition of arguments previously raised. 4 C.F.R. § 21.14(a).

We find that PFM's and ACE's requests do not satisfy the standard for reconsideration. In this regard, the requests for reconsideration primarily repeat arguments previously made and considered by our Office, and merely express disagreement with our prior decision. See Gordon R.A. Fishman--Recon., B-257634.4, Sept. 9, 1996, 96-2 CPD ¶ 110 at 2-3. In addition, the reconsideration requests also raise information that was available to the protesters at the time they filed their protests but has not been presented to our Office until now; this also does not meet the standard for reconsideration. Allstate Van & Storage, Inc.--Recon., supra. Although we have considered all of the protesters' arguments, we discuss their major contentions below.

As relevant to these reconsideration requests, the pertinent portions of the VA Act state:

(d) USE OF RESTRICTED COMPETITION.--Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, 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.

38 U.S.C. § 8127(d) (2006 & Supp. 2011).

(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.

38 U.S.C. § 8128(a) (2006).

The JWOD Act also establishes a contracting priority for AbilityOne as follows:

An entity of the Federal Government intending to procure a product or service on the procurement list . . . shall procure the product or service from a qualified nonprofit agency for the blind or a qualified nonprofit agency for other severely disabled in accordance with regulations of

the Committee and at the price the Committee establishes if the product or service is available within the period required by the entity.

41 U.S.C. § 8504(a) (2011).

PFM and ACE contend that our decision failed to give effect to the VA Act's plain and unambiguous language, which they allege establishes an absolute priority for SDVOSB and VOSB concerns in all VA contracting over preferences established under "any other provision of law," including the JWOD Act's AbilityOne preference. See 38 U.S.C. 8128(a). In this regard, the protesters assert that our decision, Alternative Contracting Enterprises, LLC; Pierce First Medical, supra, was inconsistent with our prior decisions in Aldevra, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶ 183 and Aldevra, B-406205, Mar. 14, 2012, 2012 CPD ¶ 112, which the protesters argue support their interpretation of the VA Act as establishing absolute priority for SDVOSB and VOSB concerns in VA contracting.³ The protesters argue that, in light of this priority, GAO erred when it deferred to the VA's interpretation of the priority between the VA and JWOD Acts. In the protesters' view, the more specific and later-enacted VA Act repealed by implication the priority given to AbilityOne contractors for items on the procurement list under the JWOD Act.

We disagree. Our decisions in Aldevra involved the interpretation of the VA Act without reference to other statutory preferences. Alternative Contracting Enterprises, LLC; Pierce First Medical, supra, at 4 n.8. In Aldevra, we concluded that the VA Act, 38 U.S.C. § 8127(d), required a contracting officer to first determine whether two or more SDVOSB concerns will submit offers at a fair and reasonable price before proceeding with a Federal Supply Schedule (FSS) acquisition. Moreover, we did not give deference to the VA's decision that FSS acquisitions could take priority over the VA Act's set-asides for SDVOSB and VOSB concerns. In our view, the VA's elevation of FSS acquisitions over SDVOSB and VOSB set-asides (when the conditions described in the VA Act are met) was inconsistent with the plain meaning of the statute--which was to give this priority to SDVOSB and VOSB concerns in these circumstances. See Aldevra, B-406205, Mar. 14, 2012, 2012 CPD ¶ 112 at 5, citing, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

Unlike Aldevra, the current case concerns two unambiguous statutory mandates in apparent conflict, which required our Office to attempt to harmonize the two statutes.⁴ See, e.g., Posadas v. National City Bank of New York, 296 U.S. 497, 503

³ Our Office issued two separate decisions regarding the priority of SDVOSB concerns, which we collectively refer to here as Aldevra.

⁴ The preference for FSS acquisitions is not a statutory mandate.

(1936) (honoring a longstanding principle of statutory construction, that if possible, statutes should be construed harmoniously, so as to give effect to both). Since the set-aside provisions of the VA Act, 38 U.S.C. § 8127(d), are silent with regard to the VA Act's priority over (or subordination to) the JWOD Act's contracting preference, we concluded that the VA had appropriately harmonized the two conflicting provisions in its Federal Register preamble and guidelines, which established priority for AbilityOne contractors for items already listed on the AbilityOne procurement list, but gave priority to the VA Act for previously unlisted items. Alternative Contracting Enterprises, LLC; Pierce First Medical, supra, at 6; see Skidmore v. Swift & Co., 323 U.S. 134 (1944). In harmonizing the two statutes, we avoided the disfavored approach of interpreting a statute as repealing another statute by implication. Alternative Contracting Enterprises, LLC; Pierce First Medical, supra, at 5, citing, Morton v. Mancari, 417 U.S. 535, 549 (1974).

Moreover, we do not agree with the protesters' argument that the VA Act preference operates without regard to any other provision of law. As set forth in full above, section 8128(a) anticipates the operation of other statutory preferences, and requires that priority be given "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) (emphasis added).

We also find that additional information and arguments provided by PFM and ACE for the first time in the reconsideration requests do not provide a basis to reconsider our decision.

For example, the protesters contend that the 2006 Congressional testimony of the Deputy Secretary of Veterans Affairs shows that the VA initially recognized an absolute priority in the VA Act applicable to all VA contracts, including priority over items on the AbilityOne procurement list. They assert that the Deputy Secretary chose not to recommend any changes with regard to the VA Act priority over AbilityOne, even though he recommended other changes in his testimony. Thus, in the protesters' view, the VA accepted their interpretation of the VA Act, i.e., that SDVOSB and VOSB contractors have priority over AbilityOne contractors for items on the procurement list.

In our view, this argument does not provide a valid basis for our Office to reverse its decision. Even if we agreed with the protesters' interpretation of the Deputy Secretary's silence--and we do not--the testimony of one VA witness in 2006 does not provide a basis for our Office to reach a different conclusion about the operation of this statute vis-à-vis another statute. In addition, the import of a VA witness's 2006 testimony could easily have been raised in the initial protest on this matter.

The protesters also allege that our decision erred in concluding that the Buy American Act does not provide a basis for challenging the VA's sole-source acquisitions from AbilityOne contractors. Although the protesters concede that the

Buy American Act does not impose an absolute prohibition on the purchase of foreign-made products, they argue that the Buy American Act and the Trade Agreements Act do not permit the VA to purchase items from the People's Republic of China, a non-eligible country, when there are domestic, U.S. made, or eligible country items available at fair market pricing.⁵ The protesters additionally claim that Bosma has violated the mandatory requirements for a federal contractor to provide accurate product information in its Online Representations and Certifications Application (ORCA) record with regard to Buy American Act and Trade Agreements Act compliance.

We have recognized that the Buy American Act does not provide a basis for challenging a sole-source procurement since it does not prohibit the purchase of foreign products, but merely posits a price comparison between competing offers, which is not possible when only one offer is present. See Design Pak, Inc., B-212579, Sept. 16, 1983, 83-2 CPD ¶ 336. As indicated above, we agreed with the VA that the JWOD Act required the VA to make a sole-source award to an AbilityOne contractor when an item is currently on the procurement list. While the protesters argue that they could provide the gloves at issue, once it was determined that the agency properly used the authority under the AbilityOne program to sole-source its needs, the Buy American Act's price preference is inapplicable. Accordingly, the protesters' disagreement with our conclusion provides no basis to reconsider our decision.

To the extent that the protesters assert that the VA was required to ensure that AbilityOne contractors comply with the Buy American Act before placing the orders, and that Bosma violated the mandatory requirements for a federal contractor to provide accurate product information in its ORCA record with regard to Buy American Act compliance, these are issues for the Committee to consider, as our Office does not have jurisdiction to hear these claims. 41 U.S.C. § 8503 (2011); see Microform Inc., B-246253, Nov. 13, 1991, 91-2 CPD ¶ 460 at 2.

For these reasons, we deny the request for reconsideration.

Lynn H. Gibson
General Counsel

⁵ The Trade Agreements Act does not apply to acquisitions from Nonprofit Agencies Employing People Who are Blind or Severely Disabled, and therefore provides no basis for reconsideration. Federal Acquisition Regulation § 25.401(1)(4).