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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Powerhouse Design Architects & Engineers, Ltd.

File: B-403174; B-403175; B-403176; B-403177; B-403633; B-403647; B-403648; B-403649

Date: October 7, 2010

Michael Cherock for the protester.
Dennis J. Kulish, Esq., and Kate Gorney, Esq., Department of Veterans Affairs, and Kenneth Dodds, Esq., Small Business Administration, for the agencies.
Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests that Department of Veterans Affairs improperly failed to set aside architect-engineering services procurements for service-disabled veteran-owned small businesses are sustained, where the applicable statute--the Veterans Benefits, Health Care, and Information Technology Act of 2006--and implementing regulations require such set asides where the statutory prerequisites are met.

DECISION

Powerhouse Design Architects & Engineers, Ltd., of Pittsburgh, Pennsylvania, protests the terms of eight Sources Sought Notices (SSN) issued by the Department of Veterans Affairs (VA) for architect-engineering (A/E) services.[1] The protester, a service-disabled veteran-owned small business (SDVOSB) concern, asserts that the agency improperly failed to set aside these procurements for such firms.

We sustain the protests.

[1] We docketed those protests as follows: B-403174 (SSN No. VA244-10-RP-0263); B-403175 (SSN No. VA244-10-RP-0241); B-403176 (SSN No. VA244-10-RP-0242); B-403177 (SSN No. VA244-10-RP-0245); B-403633 (SSN No. VA244-10-RP-0334); B-403647 (SSN No. VA244-10-RP-0297); B-403648 (SSN No. VA244-10-RP-0264); and B-403649 (SSN No. VA244-10-RP-0348).

These procurements were conducted pursuant to the Brooks Act,[2] 40 U.S.C. §§ 1101 et seq. (Supp. III 2006), and its implementing regulations, set forth at Federal Acquisition Regulation (FAR) subpart 36.6. In accordance with those regulations, the agency issued SSNs on the FedBizOpps website publicizing its need for A/E services. Powerhouse timely challenged the terms of the SSNs, which were issued on an unrestricted basis.

The sole protest issue is whether the agency was required to set aside these A/E procurements for SDVOSB concerns. The protester asserts that the agency's failure to do so violated the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128 (Supp. III 2006) (VA Act). In relevant part, 38 U.S.C. § 8127(d), captioned "use of restricted competition," 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. 38 U.S.C. § 8127(i)(1).

The VA issued regulations implementing the Act which, as relevant here, state as follows:

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[2] The Brooks Act, enacted in 1972, was intended to establish Federal policy concerning the selection of firms and individuals to perform architectural, engineering, and related services for the government. Specifically, the Act requires the publication of all such requirements and the negotiation of contracts based on demonstrated competence and qualifications at fair and reasonable prices. 40 U.S.C. § 1101. In a Brooks Act procurement, the agency identifies at least three of the most highly qualified firms, without regard to price, and holds discussions. FAR § 36.302-1(c). By contrast, in a FAR part 15 competition, price is a required evaluation factor. See FAR § 15.304.

> (a) . . . Except as authorized by 813.106, 819.7007 and 819.7008,[3] the contracting officer shall set aside an acquisition for competition restricted to SDVOSB concerns upon a reasonable expectation that
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> > (1) Offers will be received from two or more eligible SDVOSB concerns[4] and;
> > (2) Award will be made at a reasonable price.

VAAR, 48 C.F.R. § 819.7005(a) (emphasis added).

We see nothing in the VA Act or the VA regulations that exempts A/E procurements from the set-aside requirement. The VAAR does specify three exceptions to the requirement that contracting officers set aside acquisitions for SDVOSB concerns, but the fact that a procurement is for A/E services is not one of them. In fact, as discussed below, the VA itself offers no defense of its position based on the plain language of the Act or its regulations. Further, the Brooks Act, which prescribes procedures for conducting A/E procurements with a particular focus on how price is to be considered, is silent with respect to set-asides; nothing contained in it or its implementing regulations (FAR subpart 36.6) suggests a reasonable basis for asserting that A/E procurements are exempt from the Act or the VA regulations.[5]

The agency offers several defenses of its decision not to set aside these requirements. We consider each of them in turn.

The agency argues that its implementing regulation–the VAAR provision quoted above–"did not otherwise modify or supplement FAR Part 36.6 [on the conduct of A/E procurements]," AR at 3, and that "set-asides are not generally applicable to A-E

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[3] The three references are to other provisions in the Veterans Affairs Acquisition Regulation (VAAR) concerning use of other than competitive procedures generally to enter into contracts with an SDVOSB or VOSB concern (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).

[4] The agency concedes that two or more responsible SDVOSB concerns are likely available. Agency Report (AR) at 4.

[5] We sought the view of the Small Business Administration (SBA) on whether the set-aside requirement of the VA Act applies to VA A/E services procurements. The SBA likewise concluded that the VA must set aside A/E services procurements for exclusive competition among SDVOSB concerns upon a reasonable expectation that competitive offers would be received from two or more eligible SDVOSB concerns; no statute or regulation exempts A/E services procurements from that requirement, in the SBA's view. Letter from SBA to GAO, Sept. 13, 2010 at 2-3.

services contracting." Id. We see no relevance to the agency's accurate observation that its regulations did not modify the FAR provisions regarding A/E services procurements. The agency has offered no rationale, and we are aware of none, for why the fact that the VAAR did not modify FAR Part 36.6 would render the VAAR inapplicable to A/E services procurements. Moreover, while the agency asserts that set-asides are not "generally applicable" to A/E services contracting, it offers no legal foundation for this claim and, again, no rationale for why--even if true--it necessarily follows that the VA Act and the VAAR are inapplicable to A/E services procurements.[6]

In the course of promulgating its regulations, the agency requested comments on them. Selected comments and agency responses were published in the Federal Register, including the following exchange that addresses the applicability of the then-proposed regulations to A/E services contracts. Because this exchange is the principal basis for the VA's argument that the statutory set-aside requirement does not apply to A/E procurements, we set it out in full, as follows:

> 3. Applicability to Architect-Engineering (A/E) Services
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> Comment: Several commenters asked whether proposed subpart 819.70 applies to the award of sole source VOSB and SDVOSB contracts for A/E contracts.
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> Response: This rule does not apply to the procedures to procure A/E services. Pursuant to the Brooks Act (Pub. L. 92-582), A/E services cannot be awarded on a sole source basis. The Brooks Act requires Federal agencies to publicly announce all requirements for A/E services, and to negotiate contracts for A/E services on the basis of demonstrated competence and qualifications for the type of professional services required at fair and reasonable prices. The sole source authority in 38 U.S.C. [§] 8127 does not override the Brooks Act because under general principles of statutory interpretation the specific governs over general language. In this instance, A/E contracting statutes govern versus contracting in general. However, since the Small Business Competitiveness Demonstration Program in [FAR subpart 19.10] includes A/E services as a designated industry group (DIG), VA contracting officers may use the provisions of 38 U.S.C. [§] 8127 and this rule when procuring [designated industry group] requirements [which include A/E services]. Section 19.1007(b)(2) of the FAR, 48 C.F.R. [§] 19.1007(b)(2), establishes that Section 8(a), Historically Underutilized Business (HUB) Zone and SDVOSB set-asides, must be

[6] In fact, notwithstanding the agency's claim of a lack of "general applicability," the record contains numerous examples of agencies, including the VA, that have set aside A/E services requirements.

> considered in DIG acquisitions. However, using the provisions of 38 U.S.C. [§] 8127 and this rule, VA personnel may change the order of priority to consider SDVOSB and VOSB set-asides before Section 8(a) and HUB Zone set-asides when procuring A/E services under the Small Business Competitiveness Demonstration Program.

VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses, 74 Fed. Reg. 64620 (Dec. 8, 2009).

The agency argues that this comment and response interpreted A/E services procurements to be exempt from the regulation's set-aside requirement and that the agency's interpretation is due deference as the VA's "specific interpretation included in the rulemaking process." AR at 3.

We disagree with the agency that this comment and response reasonably can be read to mean that the VA interpreted its regulation to include an across-the-board exemption from the statutory set-aside requirement for A/E services procurements. The comment to which the VA was responding concerned only the issue of sole-source awards of A/E services contracts. Likewise, the agency's response repeatedly addressed the issue of whether the proposed regulation applied to the issuance of sole-source A/E services contracts. Far from indicating that the VA regarded all A/E services procurements as exempt from the regulation, the VA's response noted that "VA contracting officers may use the provisions of 38 U.S.C. [§] 8127 and this rule when procuring [A/E services] requirements," referring to the very statute that imposes the set-aside requirement. We see no reasonable basis on which to conclude that this exchange in the Federal Register was intended to, or in fact did, indicate that the VA interpreted its proposed regulation to exempt A/E services procurements from the SDVOSB set-aside requirement.

More important, even if the Federal Register comment and response said what the agency claims, it would not, as the agency asserts, warrant deference as an agency interpretation of a statute arrived at through rule-making or adjudication. In matters concerning the interpretation of a statute, the first question is whether the statutory language provides an unambiguous expression of the intent of Congress. If it does, our analysis 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); Mission Critical Solutions, B-401057, May 4, 2009, 2009 CPD ¶ 93 at 6. Here, the statutory requirement that certain VA acquisitions be set aside for SDVOSB concerns is clear, and the agency has offered no sufficient explanation of the need to consult the Federal Register.

In any event, deference to the interpretation of an administering agency is dependent on the circumstances. Chevron, 467 U.S. at 843-45; United States v. Mead Corp., 533 U.S. 218, 227-37 (2001). Where an agency interprets an ambiguous provision of the statute through a process of rule-making or adjudication, unless the resulting regulation or ruling is procedurally defective, arbitrary, or capricious in substance,

or manifestly contrary to the statute, deference will be given to the agency's interpretation. Mead, 533 U.S. at 227-31; Chevron, 467 U.S. at 843-44. However, where the agency's position reflects an informal interpretation, Chevron deference is not warranted; in these cases, the agency's interpretation is "entitled to respect" only to the extent it has the "power to persuade." Gonzales v. Oregon, 546 U.S. 243, 255-56 (2006).

Here, the comment and response appear in the Federal Register as part of the rule-making process, but the response is merely that, a response to a comment. The agency "interpretation" of the statute in question, 38 U.S.C. § 8127(d), is found in the regulation itself, VAAR § 819.7005, which unambiguously requires VA contracting officers to set aside an acquisition for competition restricted to SDVOSB concerns upon a reasonable expectation that competitive offers will be received from two or more eligible SDVOSB concerns. VAAR § 819.7005(a).

The agency argues that its Federal Register response was intended to address an ambiguity between the Brooks Act and the set-aside requirement in the VA Act, pointing to the fact that the Brooks Act selection procedures require discussions with at least three firms while the VA Act contemplates set-asides when there is the expectation that two or more firms are expected to submit competitive offers. According to the VA, "an ambiguity existed as to whether the set-aside and priority [under 38 U.S.C. § 8127] would apply to A&E contracting or the 'rule of three' associated with the Brooks Act would apply." Agency Comments, Sept. 21, 2010, at 8. As a result, the agency argues, the VA Act and the VAAR cannot be read as requiring the set-aside of A/E services procurements, and its Federal Register response was intended to so indicate. Contrary to the agency's position, the difference in the statutes does not establish the incompatibility of the Brooks Act with the VA Act or the VAAR, such that the VA is precluded from setting aside A/E services procurements for small businesses.[7] While the award of a contract for A/E services must be governed by the policy expressed in the Brooks Act, the "zone of competition eligible for award" may properly be limited by set-asides for particular types of firms. Vector Eng'g, Inc., B-193874, Oct. 11, 1979, 79-2 CPD ¶ 247 at 7-8.

[7] The agency itself notes that, under FAR subpart 19.10, the Small Business Competitiveness Demonstration Program, A/E services procurements are required to be set aside when the contract is valued at under $50,000 and the contracting officer determines that there is a reasonable expectation of obtaining competitive offers from two or more small businesses. AR at 4. Further, the agency does not dispute that the VA itself has, in the past, set aside A/E requirements for SBVOSB concerns. While these past set-asides do not establish the requirement at issue in this protest, they are additional evidence that the VA does not consider the Brooks Act and the set-aside requirement to be incompatible.

In sum, we conclude that the VA Act and the VAAR do not exempt A/E services procurements from the statutory requirement that VA set aside procurements for SDVOSB concerns where the prerequisites set out in the Act are met. Accordingly, we recommend that for each of the eight requirements at issue here, the agency determine whether there is a reasonable expectation that it would receive offers from two or more eligible SDVOSB concerns and award would be made at a reasonable price. For each requirement where there is such an expectation, we recommend that the VA solicit the requirement on the basis of a competition restricted to SDVOSB concerns. We also recommend that Powerhouse be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2010). Powerhouse should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. Id. § 21.8(f)(1).

The protests are sustained.

Lynn H. Gibson
Acting General Counsel