



## Decision

**Matter of:** Apex Limited, Inc.

**File:** B-402163

**Date:** January 21, 2010

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Emelio Gonzales for the protester.

Tracy Downing, Esq., Department of Veterans Affairs, for the agency.

Eric M. Ransom, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest of sole-source award to a service-disabled veteran-owned small business by the Department of Veterans Affairs is denied where the award was properly made under the authority of the statutory Veterans First Contracting Program.

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### DECISION

Apex Limited, Inc., of San Antonio, Texas, protests the sole-source award of contract No. VA791-P-0077 to American Veteran Contracting Services (AVCS), a service-disabled veteran-owned small business (SDVOSB), by the Department of Veterans Affairs (VA) for grounds maintenance services at the Fort Sam Houston National Cemetery.

We deny the protest.

Apex Limited was awarded the prior contract for this requirement on July 12, 2007. That contract's period of performance consisted of a base year through September 30, 2007, with two one-year option periods. The agency exercised both options under that contract, and Apex Limited performed the requirement until the contract's expiration on September 30, 2009. Shortly before the expiration of Apex Limited's contract, on September 24, the VA awarded the follow-on contract for the requirement to AVCS on a sole-source basis. Apex Limited argues that this sole-source award was in violation of certain provisions of Federal Acquisition Regulation (FAR) Subpart 19.14.

The FAR provisions cited by the protester are inapplicable to the award challenged here. FAR Subpart 19.14 applies to the Service-Disabled Veteran-Owned Small

Business Procurement Program, created by the Veterans Benefit Act of 2003, 15 U.S.C. § 657f (2006), and administered by the Small Business Administration.<sup>1</sup> The award here was made pursuant to the Veterans First Contracting Program, created by the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. § 8127, and administered by the VA. The Veterans First Contracting Program provides the VA with independent authority to make sole-source contract awards to SDVOSBs and veteran-owned small business firms. See In and Out Valet Co., B-311141, Apr. 3, 2008, 2008 CPD ¶ 71 at 3. Specifically, 38 U.S.C. § 8127(c) states:

(c) Sole Source Contracts for Contracts Above Simplified Acquisition Threshold.—

For purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department [of Veterans Affairs] may award a contract to a small business concern owned and controlled by veterans using procedures other than competitive procedures if—

- (1) such concern is determined to be a responsible source with respect to performance of such contract opportunity;
- (2) the anticipated award price of the contract (including options) will exceed the simplified acquisition threshold (as defined in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403)) but will not exceed \$5,000,000; and
- (3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price that offers best value to the United States.<sup>2</sup>

The Veterans First Contracting Program also includes a statement of priority for VA contract awards, which grants first priority to sole-source or set-aside contracts for

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<sup>1</sup> As relevant here, FAR Part 19 implements the acquisition-related sections of the Small Business Act, 15 U.S.C. § 631 *et seq.* FAR Subpart 19.14 describes the procedures by which agencies may make set-aside or sole-source contract awards to SDVOSB firms within the context of, and pursuant to the authority of, the Small Business Act.

<sup>2</sup> With reference to the award to AVCS, the award amount was \$2,986,744, and the contracting officer made all determinations required by 38 U.S.C. § 8127(c). Protest, Attachment 1, VA Response to Agency Protest, at 2. Apex Limited has not protested the contracting officer's determinations here.

SDVOSB firms, second priority to sole-source or set-aside contracts for veteran-owned small business firms, and lower priority for all other categories of small business firms. 38 U.S.C. § 8127(i).

In connection with its assertion that FAR Subpart 19.14 applies to the award here, Apex Limited argues that VA Information Letter 049-07-08, June 19, 2007, which provides guidance to VA contracting officers concerning the award of contracts to SDVOSBs and veteran-owned small business firms, states that “FAR Subpart 19.14 is still an existing authority.” Protest at 2. However, in this argument Apex Limited selectively quotes from a portion of the Information Letter applicable to SDVOSB set-asides, and not to SDVOSB sole-source awards. In full, the quoted passage states, “While FAR Subpart 19.14 is still an existing authority, . . . [VA] contracting officers performing SDVOSB set asides must exclusively use the authority of 38 U.S.C. 8127.” VA Information Letter 049-07-08, June 19, 2007, Attachment 1, at 2. Further, the Information Letter makes clear that VA contracting officers are authorized to make sole-source contract awards to SDVOSB firms under 38 U.S.C. 8127(c). Id.

In sum, the provisions of FAR Subpart 19.14 do not apply to the acquisition here and thus provide no basis for our Office to object to the award, which, the record shows, was properly made pursuant to the VA’s statutory authority under the Veterans First Contracting Program.

Apex Limited also contends that the VA acted in bad faith by failing to respond to its requests for assistance in this matter, by awarding the contract to AVCS without review of the existing contract, and by providing inconsistent statements concerning the award. Government officials are presumed to act in good faith, and where a protester contends that procurement officials are motivated by bias or bad faith, our Office requires convincing proof of that allegation. Superior Landscaping Co., Inc., B-310617, Jan. 15, 2008, 2008 CPD ¶ 33 at 4. We have reviewed the record here and find no evidence that the agency acted in bad faith.

The protest is denied.

Lynn H. Gibson  
Acting General Counsel