



United States Government Accountability Office
Washington, DC 20548

Decision

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

File: B-406265; B-406266; B-406291; B-406291.2; B-406318.1;
B-406318.2; B-406343; B-406356; B-406357; B-406369; B-406371;
B-406374; B-406400; B-406404; B-406428¹

Date: March 26, 2012

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Paula J. Haurilesko, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests that the Department of Veterans Affairs violated the Veterans Benefits, Health Care, and Information Technology Act of 2006 (VA Act) by failing to consider whether procurements should be set aside for service-disabled, veteran-owned small business concerns before purchasing from an AbilityOne organization are denied, where the agency reasonably read the VA Act and the Javits-Wagner-O'Day Act together to avoid conflict.

DECISION

Alternative Contracting Enterprises, LLC (ACE), of Tucson, Arizona, and Pierce First Medical (PFM), of Phoenixville, Pennsylvania, protest the issuance of purchase orders under two basic ordering agreements (BOA) to Bosma Industries for the Blind, Inc., of Indianapolis, Indiana, by the Department of Veterans Affairs

¹ In this decision we have resolved all of the outstanding protests filed by the parties concerning these same issues.

(VA) for medical exam and surgical gloves.² The protesters argue that the VA failed to consider whether these procurements should be 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) before purchasing from Bosma, an AbilityOne non-profit agency, under the Javits-Wagner-O'Day (JWOD) Act.

We deny the protests.

BACKGROUND

These protests center around the interpretation of two statutes: the JWOD Act and the VA Act.³

The JWOD Act provides government-wide authority for noncompetitive acquisitions for specified supplies or services. The Act establishes the Committee for Purchase from People Who Are Blind or Severely Disabled, and grants it exclusive authority to establish and maintain a procurement list of supplies and services provided by qualified non-profit agencies for the blind or disabled under the AbilityOne program.⁴ 41 U.S.C. §§ 8502(a), 8503(a) (2011); see Federal Acquisition Regulation (FAR) Subpart 8.7. As relevant here, the JWOD Act provides:

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 the 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).

² The protesters challenge the issuance of purchase order Nos. 520-A-20040, 520-A-20070, 652-P22809, 549-A20307, VA256-12-F-0714, 549-A20351, 549-A20349, 520-A10487, 520-A20112, 520-A20122, VA763-12-J-0023, 652-P20899, and 652-A2023 under BOA Nos. V797P-2071 and VA797-BO-0357.

³ We conducted a hearing for the purpose of receiving an explanation and argument regarding the parties' interpretations of the relevant statutes and regulations.

⁴ 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).

The VA Act provides the VA with independent authority to restrict competition for VA procurements to small business concerns owned and controlled by veterans under certain conditions. In relevant part, the VA Act provides:

(d) USE OF RESTRICTED COMPETITION.--Except as provided in subsections (b) and (c),⁵ 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). 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 section 8127(d) shall be given to SDVOSB concerns. Id. § 8127(i).

In December 2009, the VA issued regulations to implement the VA Act. As relevant here, the preamble to the regulation, issued in a Federal Register notice, stated as follows:

AbilityOne's priority status has not been changed as a result of this rule. Further, this rule does not impact items currently on the AbilityOne procurement list or items that may be added to the procurement list in the future.

74 Fed. Reg. 64,619, 64,622 (Dec. 8, 2009). In April 2010, the VA issued internal guidelines instructing contracting officers that all items currently on the AbilityOne procurement list would continue to take priority over the SDVOSB and VOSB contracting preferences mandated by the VA Act. The guidelines also provided that, for all new requirements, contracting officers must first determine whether the requirement should be set aside for SDVOSB or VOSB concerns before considering placing the requirement on the AbilityOne procurement list. ACE Post-Hearing Comments, exhib. 8, VA Guidelines, Apr. 28, 2010, at 2.

⁵ Subsections (b) and (c), permit the use under certain circumstances of noncompetitive procedures when the VA enters into contracts with SDVOSB and VOSB concerns. 38 U.S.C. § 8127(b), (c).

Between October 19, 2011 and February 2, 2012, the VA issued 13 purchase orders under two different BOAs to Bosma for exam and surgical gloves.⁶ These protests followed.

DISCUSSION

ACE and PFM raise numerous challenges to the VA's issuance of purchase orders to Bosma. Primarily, the protesters argue that the VA Act requires the VA to first determine whether the requirement can be set aside for SDVOSB or VOSB concerns before purchasing from an AbilityOne non-profit agency. The protesters also contend that Bosma will supply Chinese-made gloves in violation of the Buy American Act, and that the non-competitive issuance of purchase orders to Bosma violates the requirement in FAR § 16.703(d) to obtain competition in accordance with FAR Part 6. As explained below, we deny the protesters' challenges. Although we discuss only the more significant arguments in resolving the protests, we have considered all of the parties' arguments.⁷

Interpretation of the VA Act and the JWOD Act

ACE and PFM argue that the plain language of the VA Act requires the VA to consider setting aside these requirements for SDVOSB or VOSB concerns before considering any other mandatory preferences, such as that provided for AbilityOne organizations.⁸ ACE Protest (B-406291.2) at 3; PFM Protest (B-406291.1) at 2.

⁶ The BOA for exam gloves was established in 2005; the BOA for surgical gloves was established in July 2010.

⁷ For example, PFM also complains that the VA's issuance of purchase orders was not consistent with written policy in VA handbook 1761.1 Standardization of Supplies and Equipment Procedures. See Protest (B-406291.1) at 8-9. PFM does not explain how the agency's alleged failure to follow this internal policy violates procurement statutes or regulations. Generally, our Office will not review an alleged violation of internal policy. See, e.g., Indian Resources Int'l, Inc., B-256671, July 18, 1994, 94-2 CPD ¶ 29 at 3; Krystal Gas Mktg. Co., B-243868, May 10, 1991, 91-1 CPD ¶ 458 at 2.

⁸ We recognize that we recently found that 38 U.S.C. § 8127(d) unambiguously required that the VA set aside procurements for SDVOSB or VOSB concerns where there was a reasonable expectation that two or more such concerns would submit offers and award could be made at a fair and reasonable price. See Aldevra, B-406205, Mar. 14, 2012, 2012 CPD ¶ ___ at 5; Kingdomware Technologies, B-405727, Dec. 19, 2011, 2011 CPD ¶ 283 at 4; and Aldevra, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶ 183 at 3. The facts in the Kingdomware and Aldevra cases are inapposite to the current protests because those protests involved the interpretation of the VA Act without reference to other statutory preferences.

The VA disagrees with the protesters' assertion that the VA Act reaches the AbilityOne program. Rather, the VA contends that the VA Act is silent as to how the statute should operate with respect to the mandatory statutory preference created by the JWOD Act. See Hearing Transcript at 15-16.

Where, as here, the relationship between two statutes is at issue, the rule is to give effect to both if possible. United States v. Borden Co., 308 U.S. 188, 198 (1939). When two statutes are capable of co-existence, absent a clearly expressed congressional intention to the contrary, each must be regarded as effective. Morton v. Mancari, 417 U.S. 535, 551 (1974). Repeal by implication is strongly disfavored. Id., at 549; B-307720, Sept. 27, 2007.

The statutes at issue in this case unambiguously provide for mandatory contracting preferences. The JWOD Act provides that federal agencies shall procure items on the procurement list from an AbilityOne organization, absent certain circumstances not relevant here. See 41 U.S.C. § 8504. The VA Act provides that the VA must set aside procurements for SDVOSB or VOSB concerns if the contracting officer can expect at least two such concerns could meet the requirement at a reasonable price. 38 U.S.C. § 8127(d).

We find that the two statutes can be read so as not to conflict. In this regard, we agree with the VA that the VA Act does not expressly address the preference required by the JWOD Act. That is, the VA Act neither expressly overrides the JWOD preference nor provides that the preference for SDVOSB or VOSB concerns is subordinate to that of the AbilityOne program.⁹ Moreover, although the legislative history stresses the importance of the VA providing contracting opportunities for SDVOSB and VOSB concerns, the legislative history does not address the role of SDVOSB or VOSB contracting priorities in relation to the AbilityOne program.¹⁰

Where Congress has explicitly left a gap to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.

⁹ In contrast, the Veterans Benefits Act of 2003 (which amended the Small Business Act to provide authority for contracting officers throughout the government to restrict competition to SDVOSB concerns) expressly provides that the SDVOSB preference is not permitted if the procurement would otherwise be made under the JWOD Act. 15 U.S.C. § 657f(c).

¹⁰ In this regard, the Joint Explanatory Statement accompanying the VA Act stated that “section 8127 would give preference to small businesses owned and controlled by veterans relative to other set-aside groups” but also noted that “[t]he goals for veteran and service-disabled veteran owned businesses are not in any way intended to prevent attainment of other set-aside goals.” 152 CONG. REC. S11615-6 (daily ed. Dec. 8, 2006).

Such regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984). Because the VA Act is silent with respect to the AbilityOne program, we look to the agency's interpretation of the statute through its regulations.

The VA, however, did not explicitly address the relationship between the two statutes in its regulations. Rather, the agency addressed the AbilityOne preference in the preamble to the agency's regulations implementing the VA Act and in its internal guidelines. As noted above, the VA stated in its preamble that the priority status of the AbilityOne program would not be impacted. See 74 Fed. Reg. 64,622. In its internal guidelines, the VA instructed contracting officers to give priority to SDVOSB or VOSB concerns for items not on the AbilityOne procurement list and before seeking to place an item on the list, but to give priority to AbilityOne organizations when seeking to purchase items that were already on the procurement list. See ACE Post-Hearing Comments, exhib. 8, VA Guidelines, Apr. 28, 2010, at 2.

We agree with the protesters that the VA's preamble and internal guidance are not entitled to Chevron deference, given that neither construction reflects formal rulemaking or is a regulation. Nevertheless, this does not mean, as the protesters presume, that the agency's construction of its statute, which the VA was entrusted to administer, is entitled to no deference. While the preamble of a regulation does not control the meaning of the regulation and is not entitled to the same level of deference, the preamble is evidence of an agency's contemporaneous understanding of its rules. Wyoming Outdoor Council v. U.S. Forest Serv., 165 F.3d 43, 53 (D.C. Cir. 1999). Likewise, an agency's internal guidelines, although not entitled to the same level of deference as regulations, nonetheless are "entitled to respect" to the extent that they are persuasive. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

We find that the VA's construction of the two statutes in its preamble and guidelines is entitled to Skidmore deference, which the protesters have not shown to be inconsistent with the statutes or unreasonable. In this regard, we disagree with the protesters' contention that the VA's construction of the statutes is unreasonable because it failed to give weight to the more recent and specific VA Act. ACE Comments (B-406291.2) at 2-3; PFM Comments (B-406291.1) at 4-5. However, a later, more specific statute only trumps an earlier general one where the two statutes are in conflict. See Morton v. Mancari, supra, at 550-51; NISH; RCI, Inc. v. Rumsfeld, 348 F.3d 1263, 1272 (10th Cir. 2003) (to the extent a conflict exists between two statutes, the more specific statute must control); Coalition for a Sustainable Delta v. McCamman, 725 F.Supp. 2d 1162, 1199 (2010).

This is consistent with the recent decision of the United States Court of Federal Claims in Angelica Textile Servs., Inc. v. U.S., 95 Fed. Cl. 208 (2010).¹¹ There, the court addressed the application of the VA Act to requirements that VA sought to fulfill by procuring from the AbilityOne program, without consideration of SDVOSB or VOSB concerns. The court found no real conflict between the VA Act and the JWOD Act and gave deference to the VA's interpretation that the VA Act did not impact items already on the AbilityOne procurement list. See id. at 221-222. In this regard, the court gave a limited form of deference to the VA's guidelines, concluding that:

The Department is responsible for implementing the Veterans Benefits Act; indeed, it is the only federal department or agency to which the Act's requirements apply. The Department's New Guidelines provide detailed instructions to "fill[] a space" between the Veterans Benefits Act and Javits-Wagner-O'Day Act and their accompanying regulations. . . . The New Guidelines reflect agency-wide policy and do not conflict with the Veterans Benefits Act, the Javits-Wagner-O'Day Act, or the VA Acquisition Regulations.

Id. at 222.

In short, we conclude, as did the court in Angelica, that the VA's decision to give the AbilityOne program contracting priority for items already on the procurement list was not unreasonable in light of the statute's silence regarding this issue.¹² In reaching our conclusion, we give due deference, as did the Court of Federal Claims, to the agency's guidelines. See id., citing U.S. v. Mead Corp., 533 U.S. 218, 229 (2001).

Buy American Act

ACE and PFM contend that the gloves that Bosma will provide are made in China in violation of the Buy American Act. ACE Protest (B-406291.2) at 2; PFM Comments (B-406291.1) at 13. The VA responds that the Buy American Act does not apply to

¹¹ All of the parties cite the Angelica decision as supporting their respective protest arguments. Moreover, all of the parties argue that the VA Act and the JWOD Act can be read so as not to conflict, so long as the party's own view of the statutes is accepted.

¹² We recognize that the protesters have argued that the VA's approach to implementing the VA Act here is different from--and, in the protesters' view, inconsistent with--the approach the VA has taken, via formal rulemaking, to purchases from Federal Prison Industries (FPI). ACE Comments (B-406343) at 4; PFM Post-Hearing Comments at 13-15. This decision is necessarily limited to the case before us--i.e., whether the VA has appropriately implemented the VA Act vis-à-vis the JWOD Act. We conclude it has.

purchases from the AbilityOne procurement list, citing FAR § 8.704(b), which provides that “[n]o other provision of the FAR shall be construed as permitting an exception to the mandatory purchase of items on the Procurement List.” Agency Report (B-406291.2) at 2-3.

The protesters are, in essence, objecting to the inclusion of an item that the Committee for Purchase from People Who Are Blind or Severely Disabled placed on the AbilityOne procurement list. We have held that decisions of the Committee to add or delete a commodity or service to the procurement list are not subject to review by our Office in light of the exclusive authority vested in the Committee to establish and maintain the list in accordance with the overall purpose of the JWOD Act. See Microform Inc., B-246253, Nov. 13, 1991, 91-2 CPD ¶ 460 at 2. Moreover, the Buy American Act does not provide a basis for challenging a sole-source procurement, since the act does not impose an absolute prohibition on the purchase of foreign-made products, but merely requires a price comparison between competing offers, domestic and foreign. Bartlett Technologies Corp., B-218786, Aug. 20, 1985, 85-2 CPD ¶ 198 at 5.

Basic Ordering Agreements

ACE and PFM also argue that the VA’s use of a BOA to procure the gloves restricts competition in violation of the FAR. ACE Protest (B-406318.2) at 11; PFM Protest (B-406291.1) at 10. The protesters rely on the language in FAR § 16.703 which provides that “a [BOA] shall not . . . be used in any manner to restrict competition” and the requirement that contracting officers obtain competition before issuing an order under a BOA. FAR § 16.703(c), (d)(1). The protesters assert that the BOAs here are restricting competition and that the agency failed to compete the requirements before issuing the purchase orders.

The protesters’ arguments reflect a misunderstanding of the FAR with respect to the use of BOAs. Nothing in Bosma’s BOAs obligates the agency to purchase gloves under this contracting vehicle. Rather, the BOAs explicitly state, “nothing contained herein is intended to imply . . . any agreement by the Government or any ordering activity . . . to place future contracts or orders against this BOA.” Agency Report (B-406318.2), exhib. 1, BOA No. V797P-2071, Part 2, para. 7; exhib. 2, BOA No. VA797-BO-0357, Part 2, para. 7. The fact that an agency enters into a BOA does not in itself unduly restrict competition. See Hoffert-Marine, Inc., B-202879, Oct. 20, 1981, 81-2 CPD ¶ 321. Here, the JWOD Act provides the agency the authority to issue a purchase order to an AbilityOne organization without first competing the requirement.

The protests are denied.

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