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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Kingdomware Technologies--Reconsideration

File: B-407232.2

Date: December 13, 2012

LaTonya Barton for the protester.

John W. Gannan, II, Esq., Department of Veterans Affairs, for the agency.

Jonathan L. Kang, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In light of actions by the Department of Veterans Affairs (VA) and a recent decision by the U.S. Court of Federal Claims, the Government Accountability Office will no longer hear protests arguing solely that the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-28 (2006), requires the VA to consider setting aside a procurement for service-disabled veteran-owned small businesses, or veteran-owned small businesses, before procuring its requirements under the Federal Supply Schedule.

DECISION

Kingdomware Technologies, of Waldorf, Maryland, a service-disabled veteran-owned small business (SDVOSB), requests reconsideration of our decision in Kingdomware Technologies, B-407232, Sept. 17, 2012, in which we dismissed a protest challenging the award of task order No. VA255P657SC1615, and the exercise of an option under that task order, by the Department of Veterans Affairs (VA) to LiveProcess, Inc., of Madison, New Jersey, under that firm's Federal Supply Schedule (FSS) contract.

We dismiss the request because, as discussed below, our Office will no longer consider protests concerning the contention that the Veterans Benefits, Health Care, and Information Technology Act of 2006 (2006 VA Act), 38 U.S.C. §§ 8127-28 (2006), requires the VA to consider setting aside a procurement for SDVOSBs, or veteran-owned small businesses (VOSB), before procuring its requirements under the FSS.

On August 1, 2011, the VA issued the task order on a sole-source basis under LiveProcess' FSS contract. The VA posted information concerning the task order on the Federal Procurement Data System (FPDS) website the same day.¹ One year later, on August 1, 2012, the VA exercised an option to extend the task order, and posted the information on FPDS on August 2. The VA did not post the task order award or exercise of the option on the Federal Business Opportunities (FedBizOpps) website. On August 18, Kingdomware became aware of the information on FPDS, and on August 27 protested to our Office both the 2011 award, and the 2012 exercise of the option.

Kingdomware argued that the VA's award of the initial task order, and its exercise of the task order option one year later, did not comply with the requirements of the 2006 VA Act. Kingdomware cited our Office's decision in Aldevra, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶ 183, where we held that the plain meaning of 38 U.S.C. § 8127(d) requires the VA to conduct market research concerning its requirements and determine whether there are two or more SDVOSBs (or VOSBs) capable of performing the requirements, and if so, to set the requirement aside exclusively for SDVOSB (or VOSB) concerns. Specifically, our Office held in Aldevra that the VA must consider whether to set aside the procurement for SDVOSBs (or VOSBs) prior to conducting a procurement on an unrestricted basis under the FSS.

On September 17, our Office dismissed Kingdomware's protest. We dismissed the challenge to the underlying task order award and failure to post the award on the FedBizOpps website, concluding that, given passage of more than one year since the award of the order, "no useful purpose is served by our considering a protest of the action." Kingdomware Techs., *supra*, at 2. We also dismissed the challenge to the exercise of the option on the task order because our Office will generally not question an agency's exercise of an option contained in an existing contract, unless the protester shows that the agency failed to follow applicable regulations, or the agency's determination to exercise the option, rather than conduct a new procurement, was unreasonable. *Id.* at 2-3.

Kingdomware requests reconsideration of our decision. This request is based, at its core, on a contention that the 2006 VA Act requires the VA to consider a set-aside for SDVOSBs (or VOSBs) prior to conducting an unrestricted procurement under the FSS. Recent actions by the VA and the U.S. Court of Federal Claims lead our Office to conclude that we should not continue hearing protests that rely solely on this contention.

¹ FPDS is a publicly available database of information about executive agency contract actions above the micro-purchase threshold, located at <https://www.fpds.gov>. Federal Acquisition Regulation §§ 4.602, 4.603.

In response to our Office's decision in Aldevra and other decisions regarding the 2006 VA Act,² the VA has advised that it will not follow our recommendations concerning our interpretation of the 2006 VA Act. See GAO Annual Report to Congress for Fiscal Year 2012, at 1, available at: <http://www.gao.gov/products/GAO-13-162SP>. Additionally, on November 27, the U.S. Court of Federal Claims issued a decision which disagreed with our Office's interpretation of the 2006 VA Act. Kingdomware Techs., Inc. v. United States, No. 12-173C (Fed. Cl., Nov. 27, 2012). The court held that the VA's interpretation of the 2006 VA Act and its regulations, which permit the VA to place orders on the FSS without first considering whether to set aside a requirement for SDVOSB (or VOSB) firms, was entitled to deference. Id. at 34, 35.

While this Office has set forth its view of the 2006 VA Act in Aldevra and its progeny, as well as in testimony before the Congress,³ the VA has elected not to follow our recommendations. In addition, the court has reached a different conclusion about the meaning of the 2006 VA Act. Although our Office is not bound by the court's decisions, its decision in Kingdomware, together with the VA's position on the meaning of this statute, effectively means that protesters who continue to pursue these arguments will be unable to obtain meaningful relief. Consequently, under these circumstances, we will no longer consider protests based only on the argument that the VA must consider setting aside procurements for SDVOSBs (or VOSBs) before conducting an unrestricted procurement under the FSS.

The request for reconsideration is dismissed.

Susan A. Poling
General Counsel

² E.g., Kingdomware Techs., B-405727, Dec. 19, 2011, 2011 CPD ¶ 283; Aldevra, B-406205, Mar. 14, 2012, 2012 CPD ¶ 112; Crosstown Courier Serv., Inc., B-406262, Mar. 21, 2012, 2012 CPD ¶ 119.

³ Veterans Administration Procurement: Protests Concerning Service-Disabled Veteran-Owned Small Business Preferences Sustained, GAO-12-278T (Nov. 2011).