

Despite Kingdomware, Vet-Owned Small Biz Contracts Abound



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Law360, New York (December 07, 2012, 5:34 PM ET) -- The federal government spends over \$500 billion each year procuring goods and services from government contractors.[1] Applicable statutes and regulations provide veteran-owned small businesses (VOSBs) and service-disabled veteran-owned small businesses (SDVOSBs) with significant advantages in competing for those federal dollars.[2]

Unfortunately, a Nov. 27, 2012, decision from the United States Court of Federal Claims weakened that policy when it ruled that the Veterans Benefits, Health Care and Information Technology Act of 2006 (“2006 Veterans Benefits Act”) gives the U.S. Department of Veterans Affairs (VA) the discretion to purchase goods and services from nonveteran-owned businesses through the Federal Supply Schedule (FSS) rather than purchase those items from VOSBs and SDVOSBs through set-aside contracts. Despite the court’s decision, qualified VOSBs and SDVOSBs are well positioned to acquire a significant slice of the federal pie.

Congress Directs Preferential Treatment for VOSBs and SDVOSBs

Congress has enacted numerous statutes directing federal agencies to show preferential treatment to VOSBs and SDVOSBs during competitions for federal contracts.[3] For example, Congress has directed federal agencies to provide to VOSBs, SDVOSBs, and other small businesses the “maximum practicable opportunity to participate in the performance of contracts ...”[4] Today, at a minimum, agencies must award more than one-fifth of all procurement dollars to small businesses, including at least 3 percent of all procurement dollars to SDVOSBs.[5]

This preferential treatment is reinforced throughout the applicable regulations and agency guidelines. For example, the Federal Acquisition Regulation Subpart 19.14 provides that a contracting officer shall consider whether to set aside a contract for SDVOSBs before considering any small-business set-asides or full and open competition.[6] If two or more qualified SDVOSBs can fulfill the requirement at a reasonable price, the contracting officer may set aside the procurement for SDVOSB competition.

Indeed, if the dollar value of the procurement is modest and a single qualified SDVOSB can perform the requirement at a reasonable price, the contracting officer may sole-source the contract to the SDVOSB rather than open it up to competition from non-SDVOSBs. One important exception to these preferences is that when an agency purchases items off of the FSS, it is exempt from the normal set-aside requirements in FAR Part 19.[7]

The net result of these efforts is that in FY 2011, federal agencies purchased over \$18.4 billion in goods and services from VOSBs, \$11.2 billion of which went to SDVOSBs.[8] The U.S. Department of Defense alone purchased over \$10.8 billion in goods and services from VOSBs.

Unsurprisingly, the federal agency that awarded the greatest share of its procurement budget to VOSBs and SDVOSBs is the VA, which in FY 2011 awarded over twenty percent of its \$17 billion procurement budget to VOSBs and SDVOSBs. The VA's success is due in part to additional statutory and regulatory requirements that apply to the VA alone.

For example, the "Veterans First" provisions of the Veterans Benefits, Health Care and Information Technology Act of 2006 ("2006 Veterans Benefits Act") require that the VA must "give priority to a small business concern owned and controlled by veterans, if such business concern also meets the requirements of that contracting preference." [9]

Specifically, the VA must set aside a contract for VOSBs when the VA expects that two or more VOSBs will bid on the contract and the awarded price to the VA will be reasonable.[10] The question that soon arose is whether the VA must comply with the 2006 Veterans Benefits Act and give priority to VOSBs when the purchase is made off of the FSS.

GAO Decisions on the Veterans Benefits Act Strengthen Preferences for VOSBs, but the VA Pushes Back

The VA purchased over \$18 billion in goods and services through contracts during 2011. The VA purchased more than half of its 2011 budget, or roughly \$10 billion, of goods and services through the FSS.[11] Unfortunately, the VA has taken the position that it need not undertake any market research or restrict competition to VOSBs in accordance with the Veterans Benefits Act for purchases made through the FSS.

Under the VA's reasoning, it need only comply with the statute and show preference to VOSBs when it is necessary to meet the goals established by the secretary.[12] Because the VA was already meeting its internal goals — awarding 18 percent of available contract dollars to SDVOSBs and an additional 2 percent to nonservice-disabled VOSBs — the VA argued that it had discretion to procure items through the FSS without first looking for qualified VOSBs.[13]

Given the VA's unique mission to assist and care for veterans, one would wonder why the VA would advocate a legal theory that in essence harmed veteran-owned businesses.

Beginning in October 2011, VOSBs challenged the VA's position first through a series of bid protests at the Government Accountability Office (GAO), and most recently at the Court of Federal Claims. Starting with the seminal Aldevra case,[14] the VOSB protesters won every single case that they brought. For example, in Aldevra, the GAO sustained a VOSB's challenge to the VA's procurement of cooking equipment under two separate solicitations.

The VA had used the FSS to issue the procurements to companies holding FSS contracts that were not VOSBs. The GAO found that the VA did not have discretion to choose either the VOSB set-aside or the FSS because the use of the word "shall" in § 8127(d) of Veterans Benefits Act required contracting with a VOSB unless the VA expected that fewer than two VOSBs would be available or that the awardee's price would be unreasonable.

Two months later, in Matter of Kingdomware,[15] the GAO sustained another VOSB's challenge to VA's FSS policy. There, the VA sought to use the FSS rather than a VOSB set-aside to correct an improper sole-source award for technical subscription and support services. Kingdomware objected, arguing that the VA must apply § 8127 to determine whether the procurement should go to a VOSB. Following the logic of Aldevra, the GAO found for Kingdomware and sustained the protest.

Several more protests at the GAO followed in which the legal dispute was identical to the one raised in Aldevra and Kingdomware.[16] In each protest, the GAO ruled for the VOSB protester. In some cases, tired of having to rule on the exact same issue, the GAO's legal analysis consisted of a curt few sentences that basically stated: "we have already ruled on this — see our Aldevra decision."

The GAO decisions, however, are only advisory, and the VA refused to comply with the Aldevra line of decisions. Nor did the VA relent when the House Committee on Veterans' Affairs held a hearing in late 2011 challenging the VA's interpretation of § 8127(d). Instead, the VA's attorney argued that the VA could choose the § 8127 VOSB set-aside or elect to procure through the FSS, so long as the VA met its overall goal of awarding 12 percent of contracts to VOSBs. VA Deputy General Counsel Jack Thompson told the Committee, "VA ... is surpassing the secretary's small business contracting goals and, therefore, in our opinion, VA is meeting both the letter and spirit of [the Act]."[17]

The Court of Federal Claims Sides With the VA

After several wins at GAO but no compliance from the VA, Kingdomware brought a claim to the Court of Federal Claims in March 2012.[18] In a careful decision, Judge Nancy Firestone applied Chevron analysis and held that the VA's position was entitled to deference. In so doing, the court respectfully disagreed with GAO's Aldevra's line of cases.

The key dispute unsurprisingly involved step one of the Chevron analysis: whether Congress had unambiguously expressed its intent on the question of whether the VA may elect to procure items from the FSS without giving preference to VOSBs. As it did before GAO, Kingdomware argued that the plain language of § 8127(d) — specifically the use of the word "shall" — required the VA to set aside specific contract awards for VOSBs.

As it did before the GAO and Congress, the VA (through the U.S. Department of Justice) argued that the Veterans Benefits Act did not unambiguously require the VA to look first to qualified VOSBs before procuring items through the FSS. Instead, VA contended, the Veterans Benefits Act authorized the Secretary to set its VOSB and SDVOSB contracting goals and permitted contracting officers the discretion to meet those goals through set-asides as necessary.

Judge Firestone agreed with the VA that the statute was at best ambiguous.[19] The court found that the use of the word “shall” in § 8127(d) was qualified by the preceding phrase “for the purposes of meeting the goals under subsection (a)[.]” Thus, the court reasoned, the statute could be read as directing the VA to set-aside procurements for VOSBs only when it was necessary to achieve the goals set by the VA.[20] The court further reasoned that the statute was silent on the interplay between the VOSB set-aside and the ordinary FSS exception to FAR Part 19.

Finally, the court found compelling the legislative history of the statute, which provided that VA contracting officers retained “the option” to restrict competition to VOSBs as one of the “tools” designed to meet set-aside goals. Following its Chevron step one finding that the statute was at best silent or ambiguous, the court found that the VA’s decision to apply an exception for FSS purchases was reasonable and due deference.

Despite the Setback, Veteran-Owned Small Businesses Still Have Opportunities to Flourish

Unfortunately, the end result of the Court of Federal Claims’ Kingdomware decision is that the VA may elect to purchase items from FSS rather than show preference to VOSBs. It is impossible to know how much the VA’s current \$10 billion in FSS purchases could be satisfied by VOSBs and SDVOSBs were the VA to look first to those concerns. Indisputably, the VA’s position, approved by the Court of Federal Claims, has hurt the opportunities available to VOSBs.

Regardless of the decision, VOSBs and SDVOSBs still enjoy strong advantages in procurements by both the VA and other federal agencies. VOSBs and SDVOSBs should continue to make their unique capabilities known to federal agencies, and to monitor announcements of new market research inquiries and solicitations. In the event that a federal agency issues a request for letters of interest or other market research, VOSBs should respond with a letter expressing their interest in fulfilling the requirement at a reasonable price.

If a VOSB learns of a solicitation from any federal agency that the VOSB can fulfill and that is not set aside, the VOSB should immediately inform the contracting officer that it may fulfill the requirement. For any non-FSS procurement that is not a set-aside, a qualified VOSB should strongly consider challenging any procurement that does not comply with the 2006 Veteran Benefits Act.

It is critical that any challenge is brought before the due date for proposals. If a VOSB sleeps on its rights and waits until after the proposal due date to challenge the VA’s failure to set aside a specific contract, the result will likely be that the protest is dismissed as untimely.

For example, in *MED Trends Inc. v. United States*, the court held that the plaintiff waived its right to challenge the VA's failure to set aside for VOSBs and SDVOSBs 15 IDIQ contract awards under the T4 program. 101 Fed. Cl. 638, 647-48 (2011). Thus, the plaintiff's failure to bring a timely bid protest resulted in it being shut out of a multiyear, multibillion dollar IDIQ contract.

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[1] See www.whitehouse.gov/omb/procurement_default;
www.whitehouse.gov/blog/2011/02/04/turning-tide-contract-spending.

[2] A VOSB is a concern that is at least 51 percent owned by one or more veterans and whose management and daily business operations are controlled by such veterans. Small Business Act, Pub. L. 86-536, § 8(d)(3)(E). An SDVOSB must be similarly owned and controlled by a veteran that qualifies as service-disabled under VA regulations. 38 C.F.R. §§ 74.3, 74.4. For either a VOSB or SDVOSB to be eligible for a contract award, the contractor and veteran-owner must be verified by the VA and listed on the VA's database at www.VetBiz.gov. 38 U.S.C. § 8127(e), (f). GAO will not consider a protest challenging the VA's determination of whether to include a concern in the VIP database. 3D Contracting, Inv./Western States Constr. JV, B-406092, 2012 CPD ¶ 33 (Comp. Gen. Jan. 24, 2012). While untested, it is likely that the Court of Federal Claims would hear such a challenge under the broader jurisdictional grant afforded by the Tucker Act. See 28 U.S.C. § 1491(b); *Distributed Solutions, Inc. v. United States*, 539 F.3d 1340, 1345-46 (Fed. Cir. 2008).

[3] See e.g., Small Business Act, Pub. L. 86-536, § 8(d), 15(g); Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. 106-50; Veterans Benefits Acts in 2003, Pub. L. 108-183, § 308; 38 U.S.C. §§ 8127-28 (2006).

[4] Small Business Act, § 8(d); see also FAR 19.201(a).

[5] Small Business Act, §§ 8(d), 15(g); Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. 106-50.

[6] See also Veteran Benefit Act of 2003, 15 U.S.C. § 657f(b).

[7] FAR 8.404(a), 8.405-5(a), 19.502-1(b).

[8] https://www.fpds.gov/downloads/top_requests/FPDSNG_SB_Goaling_FY_2011.pdf.

[9] Veterans Benefits Health Care, and Information Technology Act of 2006 (“Veterans Benefits Act”), Pub.L. No. 109–461, tit. V, 120 Stat. 3403, 3435 (codified at 38 U.S.C. §§ 8127–28).

[10] See United States Dept. of Veterans’ Affairs, “Veterans First Contracting Program,” at <http://www.va.gov/osdbu/faqs/109461.asp>. 38 U.S.C. § 8127(d) (2006) provides:

“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 Department 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.”

Subsections (b) and (c) allow some noncompetitive awards to VOSBs, while subsection (a) requires VA set goals for contract awards to VOSBs and VOSBs owned by service-disabled veterans. Veterans Administration Acquisition Regulation, 48 C.F.R. § 819.7005(a) (2011) implements this subsection.

[11] United States Department of Veterans Affairs, “Office of Acquisition and Logistics — Federal Supply Schedule (FSS) Contracting,” at <http://www.va.gov/oal/business/fss/advantages.asp>.

[12] See *Kingdomware Techs., Inc. v. United States*, No. 12-173C, slip. op. at 14 (Fed. Cl., Nov. 27, 2012).

[13] The Secretary’s goals for FY 2011 were ten percent for SDVOSBs and an additional two percent for non-service-disabled VOSBs. Hearing before the Committee on Veterans’ Affairs, 112th Congress, Nov. 30, 2011 at 12.

[14] B-405271, 2011 C.P.D. ¶ 183 (2011).

[15] B-405727, 2011 C.P.D. ¶ 283 (2011).

[16] See e.g., *Crosstown Courier Serv., Inc.*, B-406262, 2012 CPD ¶ 119 (Comp. Gen. Mar. 21, 2012); *In re Phoenix Env’l Design, Inc.*, B-407104, 2012 C.P.D. ¶ 299 (Oct. 26, 2012).

[17] Hearing before the Committee on Veterans’ Affairs, 112th Congress, Nov. 30, 2011 at 11.

[18] *Kingdomware Techs., Inc. v. United States*, No. 12-173C, slip. op. at 14 (Fed. Cl., Nov. 27, 2012).

[19] *Id.* at 27-30.

[20] This finding raises troubling unanswered questions. For example, if the VA has not yet met the VOSB and SDVOSB goals set by the Secretary, may the VA employ the FSS route? Or must the VA set-aside procurements until the Secretary’s goals have been reached in that fiscal year?