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HUB-Zone Program Trumps 8(a): GAO Turns the World Upside Down

According the a very recent GAO protest decision, it was improper for an agency to proceed with a sole-source award to an ANC-owned 8(a) firm without considering whether a set-aside for HUB-Zone concerns was required. *Mission Critical Solutions*, B-401057, May 2, 2009).[1] In other words: HUB-Zone first – 8a second.

GAO considered the statutory language for the HUB-Zone program[2] and the for the 8(a) program[3], and concluded that the "shall" wording for HUB-Zone preference trumped that "may" language for the 8(a) program.

The effect of the decision is that no contract may be placed in the 8a program – whether for competition or for direct award – unless the contracting first determines that unless that agency first determines that there are not two or more HUB-Zone small businesses that could be expected to submit offers and whether the award could be made at a fair market price.

This decision will potentially have devastating effect on all 8a firms unless Congress revises the statutory authority for the HUB-Zone program. Any pending solicitation under any small business program – 8a, SDVO, small business set-aside – would appear to be vulnerable to a successful protest unless the agency first conducted adequate market research to make the determination that there weren't two or more qualified HUB-Zone firms.

GAO's handling of the protest would seem to be at odds with the generally accepted view that 8a set-aside decisions, whether for competition or for direct award, could not be challenged. The insulation from protest only extends to the discretionary actions of a contracting officer. It is not protection from actions which violate a statutory duty. The *Mission Critical Solutions* decision holds that giving preference to the HUB-Zone program over the 8a program is a firm statutory obligation.

The only solution which offers any degree of confidence would be Congressional action amending legislation which authorizes the HUB-Zone program.

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[1] A copy of the decision is attached.
[2] 15 U.S.C. § 657a
[3] 15 USC § 637(a) (1) (A).

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The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Mission Critical Solutions

File: B-401057

Date: May 4, 2009

John R. Tolle, Esq., and Bryan R. King, Esq., Barton Baker Thomas & Tolle, LLP, for the protester.
Capt. Charles D. Halverson, Department of the Army, and John W. Klein, Esq., and Laura Mann Eyester, Esq., Small Business Administration, for the agencies.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where contracting agency did not consider whether two or more qualified Historically Underutilized Business Zone (HUBZone) small businesses could be expected to submit offers and whether award could be made at a fair market price, as required by the HUBZone statute, 15 U.S.C. § 657a, prior to deciding to award contract to an Alaska Native Corporation on a sole-source basis.

DECISION

Mission Critical Solutions (MCS) of Tampa, Florida, a firm that is both an 8(a) program participant and a qualified Historically Underutilized Business Zone (HUBZone) small business, protests the Department of the Army's award of a sole-source contract for information technology (IT) support for the Office of the Judge Advocate General to Copper River Information Technology, LLC, of Anchorage, Alaska, an Alaska Native Corporation. The protester argues that rather than awarding to Copper River on a sole-source basis, the agency should have competed the requirement among HUBZone small businesses.

We sustain the protest.

BACKGROUND

The agency reports that prior to January 2008, the IT support services at issue here were provided by a large business. In December 2007, the Army notified the Small Business Administration (SBA) that the effort was appropriate for set-aside under SBA's 8(a) program and that it intended to award a sole-source contract to MCS (the

protester). SBA accepted the requirement into the 8(a) program and authorized the Army to negotiate directly with MCS. On January 31, 2008, the Army awarded MCS a 1-year contract for approximately $3.45 million.

Near the conclusion of the 1-year period of performance, the Army determined that it would structure the follow-on contract for the services to include a base and 2 option years. Because this raised the anticipated value of the contract to an amount in excess of $3.5 million, a sole-source award to the incumbent contractor was precluded by Federal Acquisition Regulation (FAR) § 19.805-1; as relevant here, that provision states that, unless SBA accepts the requirement on behalf of a concern owned by an Indian tribe or an Alaska Native Corporation, an acquisition offered to SBA under the 8(a) program must be awarded on the basis of competition limited to eligible 8(a) firms if (1) there is a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers and that award can be made at a fair market price, and (2) the anticipated total value of the contract, including options, will exceed $3.5 million (for non-manufacturing acquisitions). The Army then determined that an 8(a) Alaska Native Corporation firm, Copper River Information Technology, LLC, was capable of performing the requirement. On December 17, 2008, the Army notified SBA that, if SBA concurred, it intended to award a contract to Copper River. On December 23, SBA accepted the requirement on behalf of Copper River. The Army awarded a contract to Copper River on January 13, 2009. The protester learned of the award on January 22 and protested to our Office on January 29.

DISCUSSION

The protester challenges the agency's decision to make award on a sole-source basis to Copper River, arguing that the HUBZone statute, 15 U.S.C. § 657a (2006), requires that the procurement be set aside for competition among HUBZone small businesses.[1] As explained below, we conclude that it was improper for the agency to

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[1] In its initial protest, MCS also asserted that there are firms capable of performing the IT services that are both 8(a) program participants and qualified HUBZone small businesses and that the agency was required to compete the requirement among 8(a) firms that are also HUBZone-certified, rather than award a contract to Copper River on a sole-source basis. In support of its position, MCS cited FAR § 19.800(e), which provides in relevant part that "[i]f [an] acquisition is offered to the SBA, SBA regulations (13 C.F.R. § 126.607(b)) give first priority to HUBZone 8(a) concerns." SBA (which we invited to comment on the protest) pointed out that the SBA regulation cited in FAR § 19.800(e) as requiring that first priority be given to HUBZone 8(a) concerns is no longer in effect. That is, 13 C.F.R. § 126.607(b) was revised in 2005 to eliminate the language providing for first priority to HUBZone 8(a) concerns. The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have twice issued proposed rules providing for the amendment

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proceed with a sole-source award to Copper River without considering whether a set-aside for HUBZone concerns was required.

The HUBZone Program was established by Title VI of the Small Business Reauthorization Act of 1997, Pub. L. No. 105-135, to provide federal contracting assistance to qualified small business concerns located in historically underutilized business zones in an effort to increase employment opportunities, investment, and economic development in those areas. See FAR § 19.1301(b). Section 602(b)(1)(B) of the Act, 15 U.S.C. § 657a, provides that, "notwithstanding any other provision of law," "a contract opportunity shall be awarded pursuant to this section on the basis of competition restricted to qualified HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price."[2] (Emphasis added.) We have interpreted this language to mean that a HUBZone set-aside is mandatory where the enumerated conditions are met. International Program Group, Inc., B-400278, B-400308, Sept. 19, 2008, 2008 CPD ¶ 172 at ___.

The statutory language authorizing the 8(a) program differs from the language authorizing the HUBZone program in that it gives the contracting agency the discretion to decide whether to offer a contracting opportunity to SBA for the 8(a) program. In this connection, the statute provides in relevant part as follows:

> In any case in which [SBA] certifies to any officer of the Government having procurement powers that [SBA] is competent and responsible to perform any specific Government procurement contract to be let by

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of FAR § 19.800(e) to delete the reference to 13 C.F.R. § 126.607(b). 73 Fed. Reg. 12,700, Mar. 10, 2008; 74 Fed. Reg. 16,826, Apr. 13, 2009. The protester has not rebutted the SBA position or made any further argument regarding the applicability of FAR § 19.800(e); accordingly, we consider it to have abandoned its argument that the agency was required to set aside the procurement for HUBZone 8(a) firms.

[2] The statute also provides that a contracting officer "may" award a sole-source contract to a qualified HUBZone small business concern if the qualified HUBZone firm is determined to be a responsible contractor with respect to performance of the contract, and the contracting officer does not have a reasonable expectation that two or more qualified HUBZone firms will submit offers; the anticipated award price of the contract (including options) will not exceed $5 million (in the case of a contract opportunity assigned a standard industrial classification code for manufacturing) or $3 million (in the case of all other contract opportunities); and, in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price. 15 U.S.C. § 657a(b)(2)(A).

> any such officer, such officer shall be authorized in his discretion to let such procurement contract to [SBA] upon such terms and conditions as may be agreed upon between [SBA] and the procurement officer.

15 U.S.C. § 637(a)(1)(A) (2006).

In a case regarding the HUBZone program, the Ninth Circuit distinguished the mandatory language of the HUBZone statute from the discretionary language of the 8(a) statute as follows:

> [A]s the district court noted, "Congress has used the term 'shall' to mandate that certain contracting opportunities be set aside for competition restricted to HUBZone small businesses. With regard to the 8(a) program … Congress has … le[ft] to agency discretion the initial offer and acceptance of contracts into the 8(a) Program." [Citation omitted.] The text of the Section 8(a) Program is materially different from that of the HUBZone Program. Accordingly, the discretionary nature of the Section 8(a) Program cannot be imported into the HUBZone Program thereby eliminating the mandatory aspect of the HUBZone Program.

Contract Mgmt. Indus., Inc. v. Rumsfeld, 434 F.3d 1145, 1149 (9th Cir. 2006).[3] Similarly, our Office concluded in International Program Group, Inc., supra, that the discretion granted a contracting officer under a program that permits, but does not require, the setting aside of an acquisition for a particular subgroup of small businesses (in that case, the service-disabled veteran-owned (SDVO) small business program) does not supersede the mandatory nature of the HUBZone set-aside program.[4] In view of the mandatory nature

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[3] This decision (and the underlying District Court decision discussed in footnote 6, infra) concerned a challenge to an agency's decision to set aside a procurement for HUBZone small business concerns rather than small businesses.

[4] In its comments on the protest here, SBA argued that "the contracting officer has discretion not necessarily in using the 8(a) program, since that is an initial determination made by the SBA, but in deciding whether the 8(a) participant to be utilized by the SBA is capable of performing," and that "[t]he ultimate discretion as to whether a requirement should be placed in the 8(a) program rests with the Administrator of the SBA[;] [t]he Administrator will place a requirement into the 8(a) program when he or she decides it is necessary or appropriate." SBA Comments, Mar. 3, 2009, at 10. We understand SBA to be arguing that the cited excerpt from 15 U.S.C. § 637(a)(1)(A) does not give the contracting officer the discretion to decline to place in the 8(a) program a contract that SBA has determined appropriate for performance under the program, and that the only discretion conferred upon the contracting agency by the 8(a) statute is the discretion to reject SBA's nomination of

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of the language in the HUBZone statute, and the discretionary nature of the statutory language authorizing the 8(a) program, we conclude that it was improper for the agency to proceed with a sole-source award to Copper River without considering whether a set-aside for HUBZone concerns was required.[5]

We recognize that our conclusion that an agency must make reasonable efforts to determine whether it will receive offers from two or more HUBZone small businesses, and if so, set the acquisition aside for HUBZone firms, even where a prior contract for the requirement has previously been performed by an 8(a) contractor, is inconsistent with the views of SBA, as argued in connection with this protest and as implemented through its regulations. Those regulations essentially provide that HUBZone set-asides are not required even where the criteria specified in 15 U.S.C. § 657a(b)(2)(B) are satisfied if the requirement has previously been performed by an 8(a) contractor or the contracting officer has chosen to offer the requirement to the 8(a) program. See 13 C.F.R. §§ 126.605, 126.606, and 126.607. While an agency's interpretation of a statute that it is responsible for implementing is entitled to substantial deference, and, if reasonable, should be upheld, Blue Rock Structures, Inc., B-293134, Feb. 6, 2004, 2004 CPD ¶ 63 at 8, an interpretation that is unreasonable is not entitled to deference. We do not think that SBA's regulatory implementation of the HUBZone and 8(a) statutes is reasonable since it fails to give

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a specific contractor for performance. We do not agree with SBA that the only discretion conferred upon the contracting agency by the 8(a) statute is the discretion to reject SBA's nomination of a particular contractor for performance. In fact, this construction of the statute is at odds with SBA's own regulations, which give SBA the right to appeal to the head of the procuring agency--implying that the ultimate authority rests with the latter official--"[a] contracting officer's decision not to make a particular procurement available for award as an 8(a) contract." 13 C.F.R. § 124.505(a)(1). Moreover, even assuming that the ultimate discretion as to whether a requirement should be placed in the 8(a) program rests with the Administrator of SBA, that does not mean that the SBA's discretionary authority under the 8(a) statute supersedes the mandatory aspect of the HUBZone program.

[5] In further support of this conclusion, 15 U.S.C. § 657a(b)(4) provides that "[a] procurement may not be made from a source on the basis of a preference provided in paragraph (2) or (3), if the procurement would otherwise be made from a different source under section 4124 or 4125 of title 18 [acquisitions from Federal Prison Industries] or the Javits-Wagner-O'Day Act (41 U.S.C. 46 et seq.)." We view the omission of acquisitions in or offered to the 8(a) program from the contracting preferences explicitly exempt from application of the HUBZone statute as further evidence that Congress did not intend to exempt these acquisitions from the language making HUBZone set-asides mandatory when the specified conditions are met.

effect to the mandatory language of the HUBZone statute.[6] We note in this connection that we have reviewed the legislative history pertaining to the HUBZone program and are aware that there has been considerable discussion (expressing differing viewpoints) as to the intended relationship between the 8(a) and HUBZone programs. As we pointed out in International Program Group, Inc., supra, however, the starting point of any analysis of the meaning of a statutory provision is the statutory language, and where the language is clear on its face, as the language of the HUBZone statute is here, its plain meaning will be given effect.[7]

Contrary to the position taken by SBA in its comments on the protest, the contracting agency concedes that "before it recommends a requirement for SBA consideration as a candidate eligible for the 8(a) Program, it must first follow the

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[6] SBA argues that the district court in Contract Mgmt. Indus., Inc. v. Rumsfeld, supra, "sanctioned" its regulations exempting contract opportunities for requirements that have previously been accepted into the 8(a) program from application of the HUBZone statute. While the court there observed that the SBA regulations were consistent with a goal of preventing a conflict between the HUBZone and 8(a) programs, the court did not address the issue before us--whether it was consistent with the mandatory nature of the HUBZone statute for the regulations to exempt certain 8(a) acquisitions from the statute's application.

[7] SBA also argued that the phrase "notwithstanding any other provision of law" in the HUBZone statute is best interpreted as requiring the disregard only of provisions outside the Small Business Act and not provisions of law contained in the Act, such as those regarding the 8(a) program. SBA maintains that this interpretation is consistent with other provisions of the Act, including the section setting goals for small business contracting with various categories of small businesses, 15 U.S.C. § 644(g)(1). SBA argues that in order for any agency to assist in meeting goals for small business contracting, "the agency must be afforded some discretion in determining which small business program to utilize." SBA Comments at 10.

SBA appears to be arguing that achievement of the goals set forth in 15 U.S.C. § 644(g)(1) takes precedence over the requirement for HUBZone set-asides. As a preliminary matter, SBA has furnished no evidence to support its position that the setting aside of acquisitions for HUBZone small business concerns where the specified criteria are met will prevent the government from meeting its goals for contracting with other categories of small businesses. Moreover, as pointed out by the district court in Contract Mgmt. Indus., Inc. v. Rumsfeld, 291 F. Supp. 2d 1166 (D. Haw. 2003), "[i]f the HUBZone Program becomes so successful that it threatens the ability of other small businesses to meet their goals, Congress is free to amend the statute." Id. at 1176. In any event, while this argument likely reflects SBA's view of the better policy in this area, it does not take into account the plain language of the HUBZone statute.

HUBZone set-aside prescriptive set out in 15 U.S.C. § 657a(b)(2)," Agency Report at 7; that is, it must make reasonable efforts to ascertain whether it will receive offers from at least two HUBZone small business concerns. See International Program Group, Inc., supra, at 7; Global Solutions Network, Inc., B-292568, Oct. 3, 2003, 2003 CPD ¶ 174 at 3. The Army asserts, however, that the point at which it was required to investigate whether HUBZone firms could be expected to compete was when the requirement was originally offered to SBA under the 8(a) program (i.e., December 2007), and that any objection by the protester to the agency's failure to investigate therefore should have been raised at that time and is now untimely.

We disagree. The HUBZone statute requires that a "contract opportunity" be awarded on the basis of competition restricted to HUBZone small business concerns when the enumerated conditions are met, and, in our view, a separate "contract opportunity" arises every time an agency prepares to award a new contract. Our view is supported by SBA's regulations, which define a "contract opportunity" as a situation in which "a requirement for a procurement exists." 13 C.F.R. § 126.103. Moreover, the SBA regulations governing the award of 8(a) contracts clearly anticipate a reevaluation of the potential for competition, and a decision whether the requirement should continue under the 8(a) program, every time the award of a follow-on contract is contemplated. See 13 C.F.R. § 124.503(f).[8] Accordingly, given that MCS protested to our Office within 10 days after learning that the contract opportunity at issue here had been awarded to Copper River, we think that its protest is timely.

In sum, because the Army did not consider whether two or more qualified HUBZone small businesses could be expected to submit offers and whether award could be made at a fair market price, as required by the HUBZone statute, prior to deciding to award to Copper River on a sole-source basis, we sustain MCS's protest. We recommend that the agency undertake reasonable efforts to determine whether two or more qualified HUBZone small business concerns will submit offers and whether

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[8] In relevant part, this provision, entitled "Repetitive Acquisitions," states as follows:

> A procuring activity contracting officer must submit a new offering letter to SBA where he or she intends to award a follow-on or repetitive contract as an 8(a) award. This enables SBA to determine:
>
> (1) Whether the requirement should be a competitive 8(a) award;
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> * * * * *
>
> (4) Whether the requirement should continue under the 8(a) [business development] program.

award can be made at a reasonable price if the contract opportunity is set aside for competition among HUBZone firms. If there is such an expectation, we recommend that the Army terminate the contract awarded to Copper River and resolicit the requirement on the basis of competition restricted to HUBZone small business concerns. We also recommend that the agency reimburse the protester the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2008). The protester's certified claim for costs, detailing the time spent and cost incurred, must be submitted to the agency within 60 days after receiving this decision.

The protest is sustained.

Daniel I. Gordon
Acting General Counsel