GAO
Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

B-158766

January 8, 2010

The Honorable Nancy Pelosi
Speaker of the House
of Representatives

Dear Madam Speaker:

This letter responds to the requirement of the Competition in Contracting Act of 1984, 31 U.S.C. § 3554(e)(2) (2006), that the Comptroller General report to Congress each instance in which a federal agency did not fully implement a recommendation made by our Office in connection with a bid protest decided the prior fiscal year. There was one such occurrence in fiscal year 2009, regarding our recommendation in Mission Critical Solutions, B-401057, May 4, 2009, 2009 CPD ¶ 93, recon. denied, Small Business Administration--Recon., B-401057.2, July 6, 2009, 2009 CPD ¶ 148. We reported the matter to Congress on October 23, 2009, pursuant to 31 U.S.C. § 3554(e)(1). Enclosed is a copy of that report, as well as copies of our decisions in the case explaining in greater detail the particulars surrounding the procurement.

During the fiscal year, we received 1,898 protests (including 64 cost claims) and 91 requests for reconsideration, for a total of 1,989 cases. We closed 1,920 cases: 1,822 protests (including 60 cost claims), 96 requests for reconsideration, and 2 non-statutory decisions. Enclosed for your information is a chart comparing the bid protest activity for fiscal years 2005-2009.

A copy of this report, with the enclosures, is being furnished to the Chairman and Ranking Minority Member of the House Committee on Government Reform. A similar report is being furnished to the President of the Senate.

Sincerely yours,

Lynn H. Gibson
Acting General Counsel

Enclosures

Bid Protest Statistics for Fiscal Years 2005-2009

	FY 2009	FY 2008	FY 2007	FY 2006	FY 2005
Cases Filed[1]	1,989[2] (up 20%[3])	1,652 (up 17%)	1,411 (up 6%)	1,326 (down 2%)	1,356 (down 9%)
Cases Closed	1,920	1,582	1,394	1,275	1,341
Merit (Sustain + Deny) Decisions	315	291	335	251	306
Number of Sustains	57	60	91	72	71
Sustain Rate	18%	21%	27%	29%	23%
Effectiveness Rate (reported)[4]	45%	42%	38%	39%	37%
ADR[5] (cases used)	149	78	62	91	103
ADR Success Rate[6]	93%	78%	85%	96%	91%
Hearings[7]	12% (65 cases)	6% (32 cases)	8% (41 cases)	11% (51 cases)	8% (41 cases)

[1] All entries in this chart are counted in terms of the docket numbers ("B" numbers) assigned by our Office, not the number of procurements challenged. Where a protester files a supplemental protest or multiple parties protest the same procurement action, multiple iterations of the same "B" number are assigned (i.e., .2, .3). Each of these numbers is deemed a separate protest for purposes of this chart.

[2] Of the 1,989 cases filed in FY 2009, 168 are attributable to GAO's recently expanded bid protest jurisdiction over task orders (139 filings), A-76 protests (16 filings), and Transportation Security Administration protests (13 filings). These 168 filings represent 50% of the total increase in filings from FY 2008 to FY 2009 (337 filings).

[3] From the prior fiscal year.

[4] Based on a protester obtaining some form of relief from the agency, as reported to GAO.

[5] Alternative Dispute Resolution.

[6] Percentage resolved without a formal GAO decision.

[7] Percentage of fully developed decisions in which GAO conducted a hearing.

GAO
Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

B-401057

October 23, 2009

Congressional Committees

Subject: Mission Critical Solutions, B-401057, May 4, 2009, 2009 CPD ¶ 93, recon. denied, Small Business Administration–Recon., B-401057.2, July 6, 2009, 2009 CPD ¶ 148.

This letter is submitted pursuant to 31 U.S.C. § 3554(e)(1) (2006), which requires our Office to report any case in which a Federal agency fails to implement fully a recommendation of the Comptroller General contained in a bid protest decision. As required by that statute, this report includes a comprehensive review of the procurement, including the circumstances surrounding the failure of the contracting agency to implement the recommendation made in the decision, as well as a recommendation for further Congressional action.

The decision in question concerned the Department of the Army's selection of Copper River Information Technology, LLC of Anchorage, Alaska, an 8(a) Alaska Native Corporation, for the award of a sole-source contract for information technology support for the Office of the Judge Advocate General. The protester, Mission Critical Solutions of Tampa, Florida, which is a qualified Historically Underutilized Business Zone (HUBZone) small business, argued that rather than awarding to Copper River on a sole-source basis, the agency should have set the requirement aside for competition among HUBZone small businesses.

Our Office found 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. We based our conclusion on the plain language of the HUBZone statute, which provides in relevant part 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." 15 U.S.C. § 657a. We recommended that the agency undertake reasonable efforts to determine whether two or more qualified HUBZone small business concerns would submit offers and whether award could be made at a reasonable price if the contract opportunity were set aside for competition among HUBZone firms, and that if there were such an expectation, that the requirement be resolicited on the basis of competition restricted to HUBZone small business

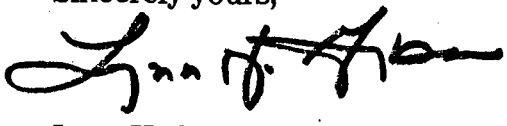
concerns. We also recommended that the agency reimburse the protester the costs of filing and pursuing its protest, including reasonable attorneys' fees.

By letter dated June 24, 2009, the Department of the Army notified our Office that it would be fully implementing the corrective action that we had recommended. In a subsequent letter dated September 28, 2009, the agency advised us that it had reversed its decision, and that rather than implementing our recommendation, it intended to make an award consistent with its original intent (i.e., as a sole-source award to an 8(a) firm). The agency explained that it was taking this action in response to an August 21, 2009 Memorandum Opinion by the Office of the Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, which in effect directed executive branch agencies to follow the Small Business Administration's (SBA) regulations placing the different categories of small businesses on an equal footing for the competition and award of contracts. (The SBA regulations in question, 13 C.F.R. §§ 126.605, 126.606, 126.607, 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.)

The Department of Justice opinion notwithstanding, we continue to read the plain language of the HUBZone statute as requiring an agency to set aside an acquisition for competition restricted to qualified HUBZone small business concerns where it has a reasonable expectation that not less than two qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price. As we explained in a September 14, 2009 letter to various Congressional Committees, this is strictly a legal determination on the part of our Office and is not intended to express a preference--in one direction or the other--about whether the HUBZone program should have priority over other set-aside programs, or whether there should be parity among the programs; we recognized that the foregoing matter is a question of policy to be resolved by Congress. In our September 14 letter, we stated our belief that the acquisition community would benefit from statutory guidance clarifying whether Congress intends for there to be parity or priority among the various set-aside programs. We continue to believe that such guidance would be helpful and recommend that Congress enact legislation clarifying its intent.

Enclosed for your review are copies of our decision on the protest and our September 14 letter to the Committees, as well as the Department of the Army's letters dated June 24 and September 28.

Sincerely yours,



Lynn H. Gibson
Acting General Counsel

Enclosures

cc: The Honorable Daniel K. Inouye
Chairman
The Honorable Thad Cochran
Vice Chairman
Committee on Appropriations
United States Senate

The Honorable Carl Levin
Chairman
The Honorable John McCain
Ranking Member
Committee on Armed Services
United States Senate

The Honorable Joseph I. Lieberman
Chairman
The Honorable Susan M. Collins
Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable Mary L. Landrieu
Chair
The Honorable Olympia J. Snowe
Ranking Member
Committee on Small Business and Entrepreneurship
United States Senate

The Honorable David R. Obey
Chairman
The Honorable Jerry Lewis
Ranking Member
Committee on Appropriations
House of Representatives

The Honorable Ike Skelton
Chairman
The Honorable Howard P. "Buck" McKeon
Ranking Member
Committee on Armed Services
House of Representatives

The Honorable Edolphus Towns
Chairman
The Honorable Darrell Issa
Ranking Member
Committee on Oversight and Government Reform
House of Representatives

The Honorable Nydia M. Velázquez
Chairwoman
The Honorable Sam Graves
Ranking Member
Committee on Small Business
House of Representatives

GAO
Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

Comptroller General
of the United States

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

[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

(continued...)

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

---

(...continued)
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

[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

(continued...)

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

---

(...continued)
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

---

[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

---

[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;
>
> * * * * *
>
> (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

GAO
Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Small Business Administration–Reconsideration

File: B-401057.2

Date: July 6, 2009

John R. Tolle, Esq., and Bryan R. King, Esq., Barton Baker Thomas & Tolle, LLP, for the protester.
John W. Klein, Esq., and Laura Mann Eyester, Esq., Small Business Administration, for the agency/requester.
Jonathan L. Kang, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Request for reconsideration from the Small Business Administration (SBA), arguing that our Office exceeded its statutory grant of authority to decide bid protests when we concluded in Mission Critical Solutions, B-401057, May 4, 2009, 2009 CPD ¶ 93, that set-asides under the Historically Underutilized Business Zone (HUBZone) program are mandatory where the enumerated conditions of the HUBZone statute are met, is denied where, despite the SBA's contentions to the contrary, our decision did not "invalidate" the SBA's conflicting regulation, and the decision, and the recommendation within it, were consistent with our statutory jurisdiction.

2. Request for reconsideration of prior decision sustaining protest is denied where newly raised information fails to show that our prior decision contains any errors of fact or law.

DECISION

The Small Business Administration (SBA) asks that we reconsider our decision in Mission Critical Solutions, B-401057, May 4, 2009, 2009 CPD ¶ 93, in which we concluded that, prior to the award of a contract to an Alaska Native Corporation on a sole-source basis, the statute authorizing a preference for Historically Underutilized Business Zone (HUBZone) small businesses requires a contracting agency to first consider whether two or more qualified HUBZone small businesses could be expected to submit offers and whether award could be made at a fair price. The SBA argues that our decision erred in concluding that the HUBZone statute creates a

mandatory preference for HUBZone small businesses over the preference for 8(a) businesses.

We deny the request for reconsideration.

BACKGROUND

Our decision in Mission Critical Solutions, supra, addressed the statutory requirements for the HUBZone and 8(a) programs, and the SBA regulations that implement these programs. 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 Federal Acquisition Regulation (FAR) § 19.1301(b). Section 602(b)(1)(B) of the Act provides as follows:

> [N]otwithstanding 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.

15 U.S.C. § 657a (emphasis added).

Based on the statute's use of the phrase "shall be awarded," 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 5.

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 the SBA for the 8(a) program. In this connection, the statute provides:

> 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 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).

MCS–a participant in the SBA's 8(a) program and a qualified HUBZone small business–challenged the award of a sole-source contract by the Department of the Army for information technology (IT) support for the Office of the Judge Advocate General to Copper River Information Technology, LLC, an Alaska Native Corporation. The requirements had been previously performed by MCS under an 8(a) set-aside.[1]

In our decision, dated May 4, 2009, we agreed with the protester's contention that the Army should have competed the requirement among HUBZone small businesses, rather than awarding to Copper River on a sole-source basis. Specifically, we concluded that, in view of the mandatory nature of the language in the HUBZone statute, and the discretionary nature of the statutory language authorizing the 8(a) program, an agency must first consider whether a set-aside for HUBZone small business concerns is required, before making a sole-source award to an 8(a) or Alaska Native Corporation. Mission Critical Solutions, supra, at 4-5. Our decision recognized that our conclusion regarding the HUBZone statute was inconsistent with the SBA's regulations, which state that

> a contracting activity may not make a requirement available for a HUBZone contract if: . . . [a]n 8(a) participant currently is performing the requirement through the 8(a)BD [business development] program or the SBA has accepted the requirement for award through the 8(a)BD program, unless the SBA has consented to release the requirement from the 8(a)BD program.

13 C.F.R. § 126.605.

---

[1] As discussed in our prior decision, the SBA had accepted the IT support services at issue here into the SBA's 8(a) program and authorized the Army to negotiate directly with MCS. These negotiations led to the award of a 1-year contract to MCS on a sole-source basis. When the agency began its planning for a follow-on contract, the anticipated value of the contract was greater than $3.5 million; thus, the agency decided that a sole-source award to MCS was precluded under FAR § 19.805-1. As relevant here, FAR § 19.805-1 states that–unless the SBA accepts the requirement on behalf of a concern owned by an Indian tribe or an Alaska Native Corporation–an acquisition 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 Copper River, an 8(a) Alaska Native Corporation firm, was capable of performing the requirement, and, with the SBA's approval, awarded a sole-source contract to that company.

On May 14, the SBA requested that we reconsider our decision.

DISCUSSION

Our Bid Protest Regulations require that a party requesting reconsideration "must show that our prior decision contains errors of either fact or law, or must present information not previously considered that warrants reversal or modification of our decision." 4 C.F.R. § 21.14(a) (2009). Our Office will not consider "a request for reconsideration based on repetition of arguments previously raised." Id.

The SBA's request for reconsideration primarily states its disagreement with our legal analysis regarding the statutory requirements for HUBZone set-asides.[2] Much of the agency's request addresses matters that were raised during the protest and discussed in our decision; those issues need not be addressed again.

We discuss below, however, the following three arguments raised by the SBA: (1) that the decision overstepped the statutory authority granted to the Government Accountability Office (GAO) to decide bid protests by "invalidating," in the SBA's view, a regulation properly promulgated by the executive branch agency charged with administering and interpreting the Small Business Act; (2) that the decision erred, as a matter of law, in its interpretation of the phrase "notwithstanding any other provision of law" found in the HUBZone statute; and (3) that the decision incorrectly stated the trial and appellate court holdings in Contract Management, Inc. v. Rumsfeld, (291 F. Supp. 2d 1166 (D. Hawaii 2003), and 434 F.3d 1145 (9th Cir. 2006), respectively), which discussed the statutory provisions for the HUBZone and 8(a) programs. As set forth more fully below, we think none of these contentions provides a basis to grant this request for reconsideration.

GAO's Statutory Authority to Decide Bid Protests

First, the SBA argues that our decision improperly concluded that its regulations concerning HUBZone set-asides are inconsistent with the HUBZone statute because "[i]t is not within GAO's authority to decide whether an agency's regulation is reasonable and void an agency's regulations." Request for Reconsideration at 5. We think that the SBA mischaracterizes the holding of our decision, and that the decision was consistent with our statutory authority.

The jurisdiction of our Office to hear bid protests is established by the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-3556 (2006). Under CICA, our Office has the authority to "determine whether [a] solicitation, proposed award, or award complies with statute and regulation." 31 U.S.C. § 3554(b)(1). As the SBA

[2] At our Office's invitation, SBA provided its views regarding these matters during the protest.

notes, bid protest decisions by our Office--an independent, nonpartisan, legislative branch agency--are not binding on executive branch agencies. See Bowsher v. Synar, 478 U.S. 714, 727-32.

Instead, our authorizing statute requires that if we conclude that an agency action violates a procurement law or regulation, we "shall recommend that the Federal agency" take actions such as "terminat[ing] the contract," or "award[ing] a contract consistent with the requirements of such statute and regulation." 31 U.S.C. § 3554(c). Upon receipt of such a recommendation from our Office, the executive branch agency is required to advise the Comptroller General by letter if the agency does not implement our recommendation. Id. The Comptroller General is required to report to the cognizant congressional committees each instance in which a federal agency did not implement our recommendation. 31 U.S.C. § 3554(e).

Our decision held that the plain meaning of the HUBZone statute creates a mandatory preference for HUBZone small business concerns when the enumerated conditions of the statute are met. Mission Critical Solutions, supra, at 7. Both the district court and the appellate court decisions cited by the SBA, and discussed in detail below, reached precisely the same conclusion. 291 F. Supp. 2d at 1166; 434 F.3d at 1149.

With respect to the SBA's concerns about its regulation, we acknowledged in our decision that our conclusions regarding the HUBZone statute were "inconsistent with the views of the SBA, as argued in connection with this protest and as implemented through its regulations," specifically, 13 C.F.R. §§ 126.605, 126.606, and 126.607. Id. at 5. Nonetheless, as we also explained, while an agency's interpretation of a statute it is responsible for implementing is entitled to substantial deference--and, if reasonable, should be upheld--an agency interpretation that is unreasonable is not entitled to deference. Id. (citing Blue Rock Structures, Inc., B-293134, Feb. 6, 2004, 2004 CPD ¶ 63 at 8). In sum, we conclude that our decision, and the recommendation within it, were consistent with our statutory jurisdiction.

Effect of "Notwithstanding" Language on Other Small Business Programs

Next, the SBA provides new information regarding its argument that the phrase in the HUBZone statute, "notwithstanding any other provision of law," should not be interpreted literally. During the course of the underlying protest, the SBA argued that this phrase should not be given its literal meaning because to do so would conflict with--and by implication repeal, in the SBA's view--the goals set under the Small Business Act for contracting with various categories of small businesses. See 15 U.S.C. § 644(g)(1). Specifically, the SBA contends that our decision would require contracting agencies to give priority to HUBZone small business concerns for all small business set-asides, and would hinder contracting agencies' ability to meet their goals for contracting with other types of small businesses, such as 8(a) firms.

We addressed this argument in our decision, noting that the SBA had not provided information to support its position. Mission Critical Support, supra, at 6 n.7. Further, we noted that the SBA's argument ignores the plain language of the HUBZone statute, which distinguishes that program from others, such as the 8(a) program, which have non-mandatory set-aside requirements. Id.

In its request for reconsideration, the SBA provided data which show that there are more registered HUBZone small business concerns than 8(a) participants for the construction and computer services industries.[3] Request for Reconsideration at 14. The agency again contends that our decision will prevent executive branch agencies from meeting their contracting goals, because all requirements will be awarded to HUBZone small business concerns, instead of the other contractors.

We think the SBA's data about the numbers of different types of HUBZone and 8(a) businesses do not establish that respecting the plain language of the HUBZone statute will effectively "repeal" the Small Business Act's contracting goals. In any event, even if that impact were established, we would not see a basis to interpret the "notwithstanding" language in a way that does not give effect to its plain meaning.[4]

---

[3] We note that the SBA could have, but did not, provide these data in its comments during the protest.

[4] The SBA's request for reconsideration also reiterates its view that three cases cited by the agency during the protest support its view that the phrase "notwithstanding other provisions of law" should not be applied literally because it would place the mandatory HUBZone requirements in conflict with the contracting goals, with the effect of repealing the latter. The SBA cites both Oregon Natural Resources Council v. Thomas, 92 F.3d 792, 796-97 (9th Cir. 1996) and In re Glacier Bay Kee Leasing Co., 944 F.2d 577, 582 (9th Cir. 1991), which hold generally that repeals of one statutory provision by another must be expressly stated, in support of its argument that applying the plain meaning of the "notwithstanding" provision would result in an improper repeal of the small business contracting goals. We do not find these cases apposite, because, as discussed above, we do not agree that the data cited by the SBA show that the HUBZone statute has the effect of repealing these goals, and because, in any event, the plain language of the statute would give explicit priority to the HUBZone program even in the event a conflict between the programs were to arise. The SBA's third case is E.P. Paup Co. v. Director, Office of Workers Compensation Programs, 999 F.2d 1341, 1348-49 (9th Cir. 1993), where the court concluded that the phrase "notwithstanding any other provision of law" in a federal statute did not mean that the statute impliedly preempted state law, as such preemptions must be explicitly set forth. Here, however, there is no issue of federal preemption of state law.

The Contract Management Decisions

Finally, the SBA contends that our decision misinterpreted the holdings of the two Contract Management decisions. Specifically, the SBA argues that the district court agreed with the agency's view "that HUBZone set-asides are not mandatory in every case and the court did not rule that HUBZone set asides take priority over the 8(a) [business development] or [the service-disabled veteran-owned small business concern] programs." Request for Reconsideration at 15. We stand by our view that these decisions support our conclusion that a HUBZone set aside is mandatory where the statute's enumerated conditions are met. See Mission Critical Solutions, supra, at 6 n.6, 7.

As a preliminary matter, the SBA seems to overlook the fact that the two Contract Management decisions addressed a challenge to an agency's decision to set aside a procurement for HUBZone small business concerns, rather than small business concerns, and the fact that, in both cases the courts rejected the argument that the HUBZone program should be viewed as providing for discretionary set-asides for small businesses, similar to the 8(a) program. In addition, both courts expressly concluded that the statutory language concerning the HUBZone program was mandatory, and therefore took precedence over a small business set-aside. In so doing, both courts distinguished between the HUBZone program's mandatory language, and the 8(a) program's discretionary language. 291 F. Supp. 2d at 1176; 434 F.3d at 1149.

Despite the underlying holdings of these decisions, the SBA correctly observes that the district court also stated that the SBA's regulations "sufficiently promote the congressional objective of parity between the HUBZone and 8(a) programs." 291 F. Supp. 2d at 1176-77. The SBA argues that our decision ignored the court's conclusion that its regulations were reasonable implementations of congressional intent that the two programs be given parity.

In our view, the district court's discussion of the SBA's regulations concerning the 8(a) program--as distinct from the statutes governing the HUBZone and 8(a) programs--was ancillary to the court's primary holding concerning the mandatory requirements of the HUBZone statute.[5] As mentioned above, however, both the

[5] For the record, we note that when the district court references a "congressional objective" that there be parity between the HUBZone and 8(a) programs, the court cites the report of the Senate Small Business Committee concerning the Small Business Reauthorization Act of 2000 (S. Rep. 106-422 (Sept. 27, 2000)). 291 F. Supp. 2d at 1176. We have found no evidence of this "objective" in the statute, which is plain on its face. In contrast, the court of appeals decision did not address this issue. Rather, the court of appeals noted that although this issue had been discussed in the district court decision, it was not raised on appeal. Contract Management, Inc., 434 F.3d at 1147 n.3.

appellate court and district court ultimately concluded, in no uncertain terms, that the HUBZone statute mandates a set-aside, while the statutory language authorizing the 8(a) program is discretionary. 434 F.3d at 1148-49; 291 F. Supp. 2d at 1176. Accordingly, we think our decision is consistent with both of the Contract Management decisions. To the extent the SBA continues to argue that our decision was in error, we find no basis to reconsider our decision.

The request for reconsideration is denied.

Daniel I. Gordon
Acting General Counsel