



United States Government Accountability Office
Washington, DC 20548

B-158766

November 23, 2010

The Honorable Nancy Pelosi
Speaker of the House
of Representatives

Dear Madam Speaker:

This letter responds to the requirements 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 were three such occurrences in fiscal year 2010, DGR Assocs., Inc., B-402494, May 14, 2010, 2010 CPD ¶ 115, Rice Servs., Inc., B-402966.2, Sept. 16, 2010, 2010 CPD ¶ 217, and Rice Servs., Inc., B-403746, Sept. 16, 2010, 2010 CPD ¶ 220. Enclosed is a copy of our report on these matters created pursuant to 31 U.S.C. § 3554(e)(1), as well as copies of our decisions in the protests explaining in greater detail the particulars surrounding the procurements.

During the fiscal year, we received 2,220 protests (including 52 cost claims) and 79 requests for reconsideration, for a total of 2,299 cases. Of the 2,299 cases filed, 189 are attributable to GAO's recently expanded bid protest jurisdiction over task orders. We closed 2,226 cases during the fiscal year: 2,131 protests (including 64 cost claims), 94 requests for reconsideration, and 1 non-statutory decision. Enclosed for your information is a chart comparing the bid protest activity for fiscal years 2006-2010.

A copy of this report, with the enclosure, 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

Enclosure

Bid Protest Statistics for Fiscal Years 2006-2010

	FY 2010	FY 2009	FY 2008	FY 2007	FY 2006
Cases Filed ¹	2,299 (up 16%)	1,989 ² (up 20% ³)	1,652 (up 17%)	1,411 (up 6%)	1,326 (down 2%)
Cases Closed	2,226	1,920	1,582	1,394	1,275
Merit (Sustain + Deny) Decisions	441	315	291	335	251
Number of Sustains	82	57	60	91	72
Sustain Rate	19%	18%	21%	27%	29%
Effectiveness Rate (reported) ⁴	42%	45%	42%	38%	39%
ADR ⁵ (cases used)	159	149	78	62	91
ADR Success Rate ⁶	80%	93%	78%	85%	96%
Hearings ⁷	10% (61 cases)	12% (65 cases)	6% (32 cases)	8% (41 cases)	11% (51 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 2,299 cases filed in FY 2010, 189 are attributable to GAO's recently expanded bid protest jurisdiction over task orders. These 189 filings represent 61% of the total increase in filings from FY 2009 to FY 2010 (310 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.



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United States Government Accountability Office
Washington, DC 20548

B-402494, B-402966.2, B-403746

November 23, 2010

Congressional Committees

Subject: DGR Assocs., Inc., B-402494, May 14, 2010, 2010 CPD ¶ 115, Rice Servs., Inc., B-402966.2, Sept. 16, 2010, 2010 CPD ¶ 217, and Rice Servs., Inc., B-403746, Sept. 16, 2010, 2010 CPD ¶ 220.

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 procurements, including the circumstances surrounding the failure of the contracting agency to implement the recommendation made in the decision.

Last fiscal year, on October 23, 2009, we reported to the Committee that the Department of the Army had failed to implement the recommendation for corrective action in our Office's decision sustaining the protest of Mission Critical Solutions, B-401057, May 4, 2009, 2009 CPD ¶ 148. In that decision, we concluded that the Historically Underutilized Business Zone (HUBZone) statute mandated a HUBZone set-aside or award where certain enumerated conditions were met, and that the Army had failed to reasonably consider whether those conditions were met prior to proceeding with a non-HUBZone small business award. We recommended that the agency reconsider whether the conditions enumerated in the HUBZone statute were met, and if so, terminate the award and make a new award to a HUBZone small business.

The Army initially indicated that it would comply with our recommendation, however, the Army subsequently advised our Office that it would not follow our recommendation in reliance on an August 21, 2009 Memorandum Opinion by the Office of the Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice (DOJ), disagreeing with our interpretation of the HUBZone statute. For further details on the circumstances of the Mission Critical Solutions protest and DOJ Memorandum Opinion, please see our Office's October 23 report to the Committee.

During fiscal year 2010, there were three further occurrences in which an agency declined to consider whether to set aside procurements for HUBZone small business firms, contrary to our Office's decisions, in reliance on the DOJ Memorandum Opinion: DGR Assocs., Inc., B-402494, May 14, 2010, 2010 CPD ¶ 115, Rice Servs., Inc., B-402966.2, Sept. 16, 2010, 2010 CPD ¶ 217, and Rice Servs., Inc., B-403746, Sept.

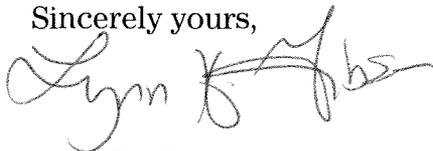
16, 2010, 2010 CPD ¶ 220. Our Office sustained each protest, and in each case recommended that the agency consider whether the conditions in the HUBZone statute were met, and if so, set aside the procurement for competition restricted to HUBZone small businesses. In each case, the agency declined to follow our recommendation, again citing the DOJ Memorandum Opinion.

As stated in our October 23 report to the Committee, in a September 14, 2009 letter to various Congressional Committees our Office explained that our conclusion regarding the HUBZone statute was strictly a legal determination and was 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. We also 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.

On September 27, 2010, the enactment of the Small Business Jobs Act of 2010 provided statutory guidance clarifying this matter, providing for parity between the various small business programs by striking mandatory language in the HUBZone statute and inserting discretionary language. See Pub. L. No. 111-240, § 1347(c).

Enclosed for your review are copies of our decisions in the protests and our Office's October 23, 2009 report to the Committee.

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



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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: DGR Associates, Inc.

File: B-402494

Date: May 14, 2010

Darcy Hennessy, Esq., Hennessy and Boe, PA, for the protester.
S. Lane Tucker, Esq., Stoel Rives LLP; Wayne A. Keup, Esq.; and William K. Walker, Esq., Walker Reausaw for the intervenors.
Christopher S. Cole, Esq., Department of the Air Force, for the agency.
Cherie J. Owen, Esq., and Edward T. Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Given the unambiguous language of the applicable statutes regarding the Historically Underutilized Business Zone (HUBZone) and 8(a) programs, contracting agency, before proceeding with an 8(a) set-aside, must first reasonably consider whether the conditions for a HUBZone set-aside exist, and, if they do, the agency must proceed with a HUBZone set-aside.

DECISION

DGR Associates, Inc. of Dallas, Texas, a Historically Underutilized Business Zone (HUBZone) small business concern, protests the terms of request for proposals (RFP) No. FA5004-10-D-0001, issued by the Department of the Air Force for military family housing maintenance. DGR argues that the Air Force should have issued the solicitation as a HUBZone set-aside rather than setting it aside under the 8(a) program.

We sustain the protest.

BACKGROUND

The Air Force, on December 22, 2009, issued the RFP as a set-aside for 8(a) small business concerns. The RFP contemplates the award of a fixed-price requirements contract for maintenance, inspection, and repair services for military family housing

(MFH) at Eielson Air Force Base, Alaska.¹ Specifically, the successful offeror will be required to provide all management, supervision, personnel, labor, equipment, vehicles, service calls, materials, tools, and other items and services necessary for maintenance of the 1,184 MFH units located on the base.

On January 22, 2010, DGR filed an agency-level protest challenging, among other things, the agency's decision not to set aside the procurement for HUBZone small businesses. The agency decided to proceed with the solicitation's closing date without amending the solicitation, and this protest followed.

DISCUSSION

DGR argues that the agency's decision to set aside the procurement for 8(a) small businesses was improper, and that the agency instead was required to set aside the procurement for HUBZone small businesses. In this regard, DGR cites several decisions issued by our Office interpreting the applicable statutes as requiring an agency to set aside a solicitation for HUBZone small business concerns where the standards of that program are satisfied. As explained in our decisions, the plain language of the statute authorizing the HUBZone program is mandatory and requires that an agency set aside a procurement when certain criteria are met (specifically, where the agency has a reasonable expectation of receiving offers from at least two qualified HUBZone small business concerns and where the award can be made at a fair market price), whereas the plain language of the authorizing statute for the 8(a) program leaves the agency with discretion to set aside the procurement. See Mission Critical Solutions, B-401057, May 4, 2009, 2009 CPD ¶ 93 at 3-8, recon. denied, Small Business Admin.—Recon., B-401057.2, July 6, 2009, 2009 CPD ¶ 148 at 5.

The Air Force acknowledges our decisions, but contends that its actions are consistent with a Memorandum Opinion by the Office of the Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice (DOJ), stating its disagreement with our decisions and concluding that the Small Business Act "does not compel SBA [the Small Business Administration] to prioritize the HUBZone Program in the manner GAO determined to be required." DOJ Memorandum Opinion, Aug. 21, 2009, at 2. This memorandum directs Executive Branch agencies to follow SBA's regulations placing the different categories of small businesses on an equal footing for the competition and award of contracts.² In this regard, the DOJ

¹ Although services and labor were to be proposed on a fixed-price basis, the solicitation provided a cost-reimbursement formula for materials. RFP at 2-15.

² 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.

Memorandum expressly instructs that “the SBA’s regulations . . . are reasonable [and are] binding on all Executive Branch agencies, notwithstanding any GAO decisions to the contrary,” and reminds agencies that GAO decisions are not binding on the Executive Branch. Id. at 13.

The DOJ 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. See also Mission Critical Solutions v. United States, No. 09-864C (Fed. Cl. Mar. 2, 2010), appeal docketed, No. 2010-5099 (Fed. Cir. Apr. 2, 2010) (rejecting DOJ’s interpretation of the HUBZone statute and concluding, consistent with our decisions in Mission Critical Solutions, B-401057, supra, that the language of the HUBZone statute is mandatory, such that a contract opportunity must be set aside for competition among qualified HUBZone small business concerns whenever the criteria set out in 15 U.S.C. § 657a are met). Thus, we conclude that the Air Force was required to first consider whether the conditions for setting aside a procurement for HUBZone businesses were met, and if so, to set aside the procurement for HUBZone small businesses. Because the agency did not perform this mandatory step, we conclude that it was improper for the agency to proceed with this procurement as an 8(a) set-aside, and we sustain the protest.

RECOMMENDATION

We recommend that the agency undertake reasonable efforts to ascertain whether it will receive offers from at least two HUBZone concerns and award will be made at a fair market price. If the agency’s research indicates that these conditions are met, the agency should cancel the current solicitation and reissue it as a HUBZone set-aside. We also recommend that the agency reimburse the protester its costs of filing and pursuing the protest, including reasonable attorneys’ fees.³ 4 C.F.R. § 21.8(d)(1) (2009).

In making our recommendation, we recognize, as the Air Force has noted and the DOJ memorandum indicates, that the recommendations in our bid protest decisions are not binding on Executive Branch agencies. Small Business Admin.—Recon., supra, at 5 (citing Bowsher v. Synar, 478 U.S. 714, 727-32 (1986)). This fact, however, does not affect our statutory obligation to decide protests concerning alleged violations of procurement statutes and regulations. See 31 U.S.C. § 3552 (2006). We have clearly stated our view on the proper interpretation of the HUBZone statute, and we recognize that the Executive Branch has resolved to apply its own, contrary

³ DGR challenged other aspects of the RFP which it subsequently withdrew. DGR may not recover protest costs associated with the withdrawn issues.

interpretation of the HUBZone statute. Accordingly, absent some change in the statutory scheme, Executive Branch policy, or a contrary decision by the United States Court of Appeals for the Federal Circuit in connection with the Justice Department's appeal of the decision in Mission Critical Solutions v. United States, supra, we will decide future protests raising the issue here in an expedited and summary manner, in the interest of reducing the costs associated with filing and pursuing such protests.

The protest is sustained.

Lynn H. Gibson
Acting General Counsel



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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Rice Services, Inc.

File: B-402966.2

Date: September 16, 2010

William R. Purdy, Esq., Bradley Arant Boult Cummings LLP, for the protester.
Helen J.S. White, Esq., Defense Commissary Agency, for the agency.
Eric M. Ransom, Esq., and Christine S. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

In accordance with DGR Assocs., Inc., B-402494, May 14, 2010, 2010 CPD ¶ 115, protest is summarily sustained where contracting agency declined to consider whether to set aside solicitation for competition limited to Historically Underutilized Business Zone small business concerns in reliance on the August 21, 2009 Memorandum Opinion by the Office of the Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice.

DECISION

Rice Services, Inc., of Smithville, Tennessee, a Historically Underutilized Business Zone (HUBZone) small business concern, protests the terms of solicitation No. HDEC08-10-R-0018, issued as a set-aside for service-disabled veteran-owned small business concerns (SDVOSBC) by the Defense Commissary Agency (DeCA) for shelf stocking and custodial services at the Davis-Monthan Air Force Base Commissary.

We sustain the protest.

DeCA issued the solicitation on July 30, 2010, as a total set-aside for SDVOSBCs. Rice Services filed this protest on August 16, arguing that the procurement should instead be set aside for competition limited to HUBZone small business concerns. In this regard, Rice Services asserts that the conditions for a mandatory HUBZone set-aside exist, citing the HUBZone statute, 15 U.S.C. § 657a, Federal Acquisition Regulation (FAR) § 19.1305(a), and our decision in DGR Assocs., Inc., B-402494, May 14, 2010, 2010 CPD ¶ 115.

Our Office has considered this issue in several prior protests, including DGR Assocs., Inc., supra; Mission Critical Solutions, B-401057, May 4, 2009, 2009 CPD ¶ 93, recon. denied, Small Business Admin.--Recon., B-401057.2, July 6, 2009, 2009 CPD ¶ 148; and International Program Group, Inc., B-400278, B-400308, Sept. 19, 2008, 2008 CPD ¶ 172. In each decision, our Office has concluded that the HUBZone statute requires procuring agencies to set aside procurements for HUBZone small business concerns when the conditions set forth in the statute are met.

In our most recent decision on this issue, DGR Assocs., Inc., the agency explained that it had decided not to set aside the procurement for HUBZone small business concerns in reliance on a Memorandum Opinion by the Office of the Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice (DOJ), stating disagreement with our decisions and concluding that the Small Business Act does not require the prioritization of the HUBZone program in the manner that our Office has determined. See DOJ Memorandum Opinion, Aug. 21, 2009, at 2. The DOJ Memorandum states that “the SBA’s regulations [creating parity between the HUBZone program and other small business set-aside programs] . . . are reasonable [and are] binding on all Executive Branch agencies, notwithstanding any GAO decisions to the contrary.” Id. at 13.

The DOJ Memorandum notwithstanding, our Office concluded in DGR Assocs., Inc., as in prior decisions, that the plain language of the HUBZone statute requires an agency to set aside an acquisition for competition restricted to qualified HUBZone small business concerns where the conditions set forth in the HUBZone statute are met. We also advised that, going forward, protests raising the sole issue of HUBZone set-aside priority would be addressed in an “expedited and summary manner” where the agency acted contrary to our decisions in reliance on the DOJ Memorandum Opinion. DGR Assocs., Inc., supra, at 4.

Accordingly, after Rice Services filed its current protest, we requested that DeCA inform our Office whether it had acted in reliance on the DOJ Memorandum Opinion. DeCA responded that “[i]n issuing the solicitation for SDVOSBC, the Agency [acted] in reliance on the Memorandum Opinion issued by the Office of the Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, which concluded that there is no statutory requirement to prioritize the HUBZone program.” DeCA Response, Aug. 18, 2010, at 1.

As explained in our prior decision, we 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. See also Mission Critical Solutions v. United States, No. 09-864C (Fed. Cl. Mar. 2, 2010), appeal docketed, No. 2010-5099 (Fed. Cir. Apr. 2, 2010) (rejecting DOJ’s interpretation of the HUBZone statute and concluding, consistent with our decision in Mission Critical Solutions,

B-401057, supra, that the language of the HUBZone statute is mandatory, such that a contract opportunity must be set aside for competition among qualified HUBZone small business concerns whenever the criteria set out in 15 U.S.C. § 657a are met). Thus, we conclude that DeCA was required to consider whether the conditions for setting aside a procurement for HUBZone small business concerns were met, and if so, to set aside the procurement for HUBZone small businesses. Because the agency did not perform this mandatory step, we conclude that it was improper for the agency to proceed with this procurement as an SDVOSBC set-aside.

RECOMMENDATION

In making our recommendation, we recognize, as the DOJ Memorandum Opinion indicates, that the recommendations in our bid protest decisions are not binding on Executive Branch agencies. Small Business Admin.--Recon., supra, at 5 (citing Bowsher v. Synar, 478 U.S. 714, 727-32 (1986)). This fact, however, does not affect our statutory obligation to decide protests concerning alleged violations of procurement statutes and regulations. See 31 U.S.C. § 3552 (2006).

Accordingly, we recommend that the agency undertake reasonable efforts to ascertain whether it will receive offers from at least two HUBZone concerns and award will be made at a fair market price. If the agency's research indicates that these conditions are met, the agency should cancel the current solicitation and reissue it as a HUBZone set-aside. We also recommend that the agency reimburse the protester its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2010). Rice Services should submit its claim for protest costs directly to DeCA within 60 days of receipt of this decision.

The protest is sustained.

Lynn H. Gibson
Acting General Counsel



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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Rice Services, Inc.

File: B-403746

Date: September 16, 2010

William R. Purdy, Esq., Bradley Arant Boult Cummings LLP, for the protester.
LTC Won K. Lee and Christopher S. Cole, Esq., Department of the Air Force, for the agency.

Eric M. Ransom, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In accordance with DGR Assocs., Inc., B-402494, May 14, 2010, 2010 CPD ¶ 115, protest is summarily sustained where contracting agency declined to consider whether to set aside solicitation for competition limited to Historically Underutilized Business Zone small business concerns in reliance on the August 21, 2009 Memorandum Opinion by the Office of the Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice.

DECISION

Rice Services, Inc., of Smithville, Tennessee, a Historically Underutilized Business Zone (HUBZone) small business concern, protests the terms of solicitation No. FA4800-10-R-0003, issued by the Department of the Air Force for mess attendant services at Langley Air Force Base, Virginia.

We sustain the protest.

The Air Force issued the solicitation on August 16, 2010, as a set-aside for competition among section 8(a) small business concerns. Rice Services filed this protest on August 31, arguing that the procurement should instead be set aside for competition limited to HUBZone small business concerns. In this regard, Rice Services asserts that the conditions for a mandatory HUBZone set-aside exist, citing the HUBZone statute, 15 U.S.C. § 657a, Federal Acquisition Regulation (FAR)

§ 19.1305(a), and our decision in DGR Assocs., Inc., B-402494, May 14, 2010, 2010 CPD ¶ 115.

Our Office has considered this issue in several prior protests, including DGR Assocs., Inc., *supra* (which also involved a procurement by the Air Force); Mission Critical Solutions, B-401057, May 4, 2009, 2009 CPD ¶ 93, *recon. denied*, Small Business Admin.–Recon., B-401057.2, July 6, 2009, 2009 CPD ¶ 148; and International Program Group, Inc., B-400278, B-400308, Sept. 19, 2008, 2008 CPD ¶ 172. In each decision, our Office has concluded that the HUBZone statute requires procuring agencies to set aside procurements for HUBZone small business concerns when the conditions set forth in the statute are met.

In our most recent decision on this issue, DGR Assocs., Inc., the Air Force explained that it had decided not to set aside the procurement for HUBZone small business concerns in reliance on a Memorandum Opinion by the Office of the Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice (DOJ), stating disagreement with our decisions and concluding that the Small Business Act does not require the prioritization of the HUBZone program in the manner that our Office has determined. See DOJ Memorandum Opinion, Aug. 21, 2009, at 2. The DOJ Memorandum states that “the SBA’s regulations [creating parity between the HUBZone program and other small business set-aside programs] . . . are reasonable [and are] binding on all Executive Branch agencies, notwithstanding any GAO decisions to the contrary.” *Id.* at 13.

The DOJ Memorandum notwithstanding, our Office concluded in DGR Assocs., Inc., as in prior decisions, that the plain language of the HUBZone statute requires an agency to set aside an acquisition for competition restricted to qualified HUBZone small business concerns where the conditions set forth in the HUBZone statute are met. We also advised that, going forward, protests raising the sole issue of HUBZone set-aside priority would be addressed in an “expedited and summary manner” where the agency acted contrary to our decisions in reliance on the DOJ Memorandum Opinion. DGR Assocs., Inc., *supra*, at 4.

Accordingly, after Rice Services filed its current protest, we requested that the Air Force inform our Office whether it had acted in reliance on the DOJ Memorandum Opinion. The Air Force responded that “[consistent] with our prior position, the Air Force intends to follow the Memorandum Opinion issued by the Office of the Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, concluding that there is no statutory requirement to prioritize the HUBZone small business program.” Air Force Letter to GAO, Sept. 10, 2010, at 1.

As explained in our prior decisions, we 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. See also Mission Critical Solutions v. United States, No. 09-864C (Fed. Cl. Mar. 2, 2010), appeal docketed, No. 2010-5099 (Fed. Cir. Apr. 2, 2010) (rejecting DOJ's interpretation of the HUBZone statute and concluding, consistent with our decision in Mission Critical Solutions, B-401057, supra, that the language of the HUBZone statute is mandatory, such that a contract opportunity must be set aside for competition among qualified HUBZone small business concerns whenever the criteria set out in 15 U.S.C. § 657a are met). Thus, we conclude that the Air Force was required to consider whether the conditions for setting aside a procurement for HUBZone small business concerns were met, and if so, to set aside the procurement for HUBZone small businesses. Because the agency did not perform this mandatory step, we conclude that it was improper for the agency to proceed with this procurement as an 8(a) set-aside.

RECOMMENDATION

In making our recommendation, we recognize, as the DOJ Memorandum Opinion indicates, that the recommendations in our bid protest decisions are not binding on Executive Branch agencies. Small Business Admin.--Recon., supra, at 5 (citing Bowsher v. Synar, 478 U.S. 714, 727-32 (1986)). This fact, however, does not affect our statutory obligation to decide protests concerning alleged violations of procurement statutes and regulations. See 31 U.S.C. § 3552 (2006).

Accordingly, we recommend that the agency undertake reasonable efforts to ascertain whether it will receive offers from at least two HUBZone concerns and award will be made at a fair market price. If the agency's research indicates that these conditions are met, the agency should cancel the current solicitation and reissue it as a HUBZone set-aside. We also recommend that the agency reimburse the protester its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2010). Rice Services should submit its claim for protest costs directly to the Air Force within 60 days of receipt of this decision.

The protest is sustained.

Lynn H. Gibson
Acting General Counsel



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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

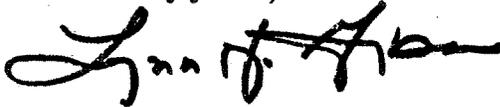
concerns. We also recommended that the agency reimburse the protester the costs of filing and pursuing its protest, including reasonable attorneys' fees.

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