

## **OMB AND GAO AT ODDS OVER SET-ASIDE PROGRAMS**

**Agencies Advised to Disregard GAO Recommendations that Contracting Officers Set-aside Contracts to Qualified HUBZone Small Businesses Instead of Using 8(a) or SDVOSB Set-Asides, When Two or More HUBZone Firms Can Submit Fair Market Prices.**

**The Issue Will Likely Be Settled By Congress.**

In two recent rulings, *International Program Group, Inc.*, B-400278, (September 19, 2008), and *Mission Critical Solutions*, B-401057 (May 4, 2009), reconsideration denied ( July 6, 2009), the GAO effectively rejected the arguments advanced by the SBA that under SBA's regulations there is "parity" among the HUBZone, 8(a), and Small Disadvantaged Veteran Owned Small Business (SDVOSB) programs and that contracting officers are given substantial discretion to consider contracts for these programs *without having* to prioritize one program above another. In *Mission Critical Solutions*, GAO concluded that the Army must 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 market price, as required by the HUBZone statute, prior to awarding to an Alaska Native Corporation on a sole source basis. The GAO recommended that if the Army determines that an award could be made to a HUBZone company at a reasonable price following competition, it should terminate the contract awarded to the 8(a) Alaska Native Corporation firm and resolicit the procurement as a competitive HUBZone set-aside. Earlier, in *International Program Group*, GAO similarly concluded, that before proceeding with a procurement set-aside for an SDVOSB, an agency must first reasonably consider whether the conditions for a HUBZone set-aside exists, i.e., whether the agency will receive offers from at least two HUBZone concerns and award will be made at a fair market price to such a concern.

In response to these decisions, and SBA's objections, OMB issued a memo dated July 10, 2009, which advised agencies to disregard these decisions pending further legal review in favor of their pre-existing contracting policies and "parity" practices. More recently, the Office of Legal Counsel of the Department of Justice (DOJ) has weighed-in by fully supporting SBA's position. According to DOJ, the Small Business Act does not compel prioritization of awards under the HUBZone Program over the 8(a) and SDVOSB programs. DOJ also points out that the "recommendations" of GAO, an oversight arm of the legislative branch, are not binding on the executive branch. According to DOJ, the SBA's application of its regulations is reasonable and binding on executive branch agencies, notwithstanding any GAO decisions to the contrary.

This "clash" between the Administration and the GAO over the interpretation of the law pertaining to the use of these set-aside programs has also resulted in an examination of the power of the GAO to influence the behavior of a procuring agency of the executive branch when a protest is filed. As the Comptroller General readily concedes in *Mission Critical Solutions*, the GAO only has the power to make "recommendations" as to how a federal agency within its jurisdiction should resolve a bid protest brought to its attention. In fact, as pointed out by DOJ and acknowledged by GAO, these "recommendations" are nonbinding and agencies can choose to ignore them, even though they are supposed to minimally give some deference to the opinion of GAO. While agencies have been often criticized by protestors for silently ignoring GAO recommendations, an agency that has lost a protest openly announcing that it does not intend to implement GAO's recommendation for corrective action is a relatively rare occurrence. When that does happen, GAO is required by law to report the non-implementation of its recommendations to the cognizant congressional committee.

There are reports that the issue of the prioritization of these programs will be decided by Congress. The Senate has passed legislation that would result in establishing parity among the three categories of disadvantaged businesses consistent with the SBA's interpretation of the current law. The legislation has to be finalized by the Congress and signed by the President.

If you need any additional information concerning the prioritization of these programs, or other issues relating to government contracting, you can contact **Ken Brody of David, Brody & Dondershine, LLP at 703-264-2220 or KBrody@dbd-law.com.**

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