Set-Asides for Small Businesses: Recent Developments in the Law Regarding Precedence Among the Set-Aside Programs and Set-Asides Under Indefinite-Delivery/Indefinite-Quantity Contracts

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Summary

In government contracting law, a "set-aside" is a procurement in which only certain businesses can compete. Set-asides can be exclusive or partial, depending upon whether the entire procurement, or just part of it, is so restricted. Eligibility for set-asides is typically based on business size, as well as demographic characteristics of the business owners. Currently, federal law provides, in various ways, for set-asides for (1) small businesses generally, (2) small businesses located in Historically Underutilized Business Zones (HUBZones) (HUBZone small businesses), (3) service-disabled veteran-owned small businesses (SDVOSBs), (4) small businesses owned and controlled by socially and economically disadvantaged individuals that are participating in the Minority Small Business and Capital Ownership Development Program authorized by Section 8(a) of the Small Business Act (8(a) small businesses), and (5) women-owned-and-controlled small businesses.

On September 27, 2010, President Obama signed the Small Business Jobs Act of 2010 (P.L. 111-240) which amends several provisions of the Small Business Act pertaining to set-asides. P.L. 111-240 changes certain language in the provisions regarding HUBZone set-asides to make clear that agencies may—but are not required to—use HUBZone set-asides when there is a reasonable expectation that at least two qualified HUBZone small businesses will submit offers and the award can be made at a fair market price. P.L. 111-240 also expressly authorizes agencies to set aside parts of multiple-award contracts for small businesses; place orders under multiple-award contracts with small businesses without complying with certain procedures ensuring that firms holding such contracts generally have a "fair opportunity to be considered" for orders under them; and "reserve" one or more awards for small businesses under "full and open multiple award procurements."

P.L. 111-240 was enacted in response to a series of decisions in 2008-2010 by the U.S. Court of Federal Claims and the Government Accountability Office (GAO) interpreting the provisions of the Small Business Act establishing or implementing the set-aside programs for small businesses. One of these decisions, *DGR Associates, Inc. v. United States*, issued by the Court of Federal Claims on August 13, 2010, permanently enjoined the government from using an 8(a) set-aside when there is a reasonable expectation that at least two qualified HUBZone small businesses will submit offers and the award can be made at a fair market price. The court did so based, in part, on the interpretation of the Small Business Act set forth in its March 2, 2010, decision in *Mission Critical Solutions v. United States*. In *Mission Critical Solutions*, the court held that set-asides for HUBZone small businesses have precedence over those for 8(a) small businesses because HUBZone set-asides are mandatory while 8(a) set-asides are discretionary, and mandatory agency actions take precedence over discretionary ones. Another decision, *Delex Systems, Inc.*, issued by GAO on October 28, 2008, recommended that orders issued under certain multiple-award contracts be subject to set-asides for small businesses because they are "acquisitions," and any acquisition over $150,000 is subject to set-asides for small businesses.

While P.L. 111-240 did not amend the Small Business Act to explicitly provide for "parity" among the set-aside programs, the Federal Acquisition Regulatory Council amended the Federal Acquisition Regulation in April and May 2011 to establish that "there is no order of precedence" among the set-aside programs. Also, in February 2011, a court awarded attorneys' fees, costs, and expenses under the Equal Access to Justice Act to a firm that had challenged the government's argument that there was parity among the set-aside programs prior to the enactment of P.L. 111-240. The court did so because it found that the government's position in this litigation was not substantially justified.

Contents

Tables

Appendixes

Contacts

Introduction

This report discusses programs that allow certain government procurement contracts to be set aside for small businesses; decisions by the U.S. Court of Federal Claims and the Government Accountability Office (GAO) in 2008-2010 interpreting the laws that authorized or implemented the set-aside programs; and legislation enacted by the 111th Congress in response to these decisions.

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[1] DGR Assocs., Inc. v. United States, 94 Fed. Cl. 189 (2010).

[2] Mission Critical Solutions v. United States, 91 Fed. Cl. 386 (2010).

[3] Delex Sys., Inc., B-400403, 2008 U.S. Comp. Gen. LEXIS 170 (October 8, 2008).

This report will not be updated and is superseded by CRS Report R41945, *Small Business Set-Aside Programs: An Overview and Recent Developments in the Law*, by (name redacted) and (name redacted), which discusses related questions about the "priority" of set-aside programs under the Veterans Benefits, Health Care, and Information Technology Act of 2006, among other things.

Set-Asides Under the Small Business Act

A "set-aside" is a procurement in which only certain businesses can compete. Set-asides can be exclusive or partial, depending upon whether the entire procurement, or just part of it, is so restricted.[4] Eligibility for set-asides is typically based on business size, as well as demographic characteristics of the business's majority owner(s).[5] Set-asides, under the current law, are not the same as quotas. Although agencies can set aside procurements for certain groups and are required by statute to set minimum goals for contracting with these groups,[6] the set-aside programs and the goals are not presently coupled. That is, the set-aside programs do not automatically ensure that certain groups get a share of government contracts corresponding to agencies' contracting goals. Quotas, in contrast, would ensure that certain categories of businesses (e.g., minority-owned) get fixed percentages of government contracts.[7]

Although the Competition in Contracting Act (CICA) generally requires "full and open competition" for government procurement contracts, set-asides are permissible competitive procedures.[8] CICA specifically authorizes competitions excluding all sources other than small businesses (i.e., set-asides) when such competitions serve, among other things, to assure that a "fair proportion" of all government purchases and contracts within each category of industry are placed with small businesses.[9]

Set-Aside Programs: Key Definitions

Under federal laws and regulations, there are currently five set-aside programs, benefiting (1) small businesses generally, (2) HUBZone small businesses, (3) SDVOSBs, (4) 8(a) small businesses, and (5) small businesses owned and controlled by women. A small business is one that is "independently owned and operated," is "not dominant in its field of operation," and meets any definitions or standards established by the SBA.[10] These standards focus primarily upon the

[4] *See, e.g.*, 48 C.F.R. § 19.502-2 (total set-asides); 48 C.F.R. § 19.502-3 (partial set-asides).

[5] *See* 15 U.S.C. § 637(a) (set-asides for 8(a) small businesses); 15 U.S.C. § 637(m) (set-asides for women-owned small businesses); 15 U.S.C. § 644 (set-asides for small businesses generally); 15 U.S.C. § 647a (set-asides for HUBZone small businesses); and 15 U.S.C. § 657f (set-asides for SDVOSBs).

[6] *See* 15 U.S.C. § 644(g)(1)-(2).

[7] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (finding unconstitutional a municipal ordinance that required the city's prime contractors to award at least 30% of the dollar amount of each contract to minority subcontractors).

[8] 41 U.S.C. § 253(b)(1); 41 U.S.C. § 259(b). For more on competition in federal contracting, see CRS Report R40516, *Competition in Federal Contracting: An Overview of the Legal Requirements*, by (name redacted).

[9] 41 U.S.C. § 253(b)(2) (CICA provision authorizing set-asides for small businesses); 15 U.S.C. § 644(a) (describing when set-asides for small businesses are permissible); 48 C.F.R. §§ 6.203-6.206 (authorizing set-asides for small business generally, 8(a) small businesses, HUBZone small businesses, and SDVOSBs).

[10] 15 U.S.C. § 632(a)(1)-(2)(A).

size of the business, as measured by the number of employees, its annual average gross income, and the size of other businesses within the same industry.[11] The various subcategories of small businesses, such as HUBZone, service-disabled veteran-owned, 8(a), and women-owned, must meet the general criteria, as well as specific criteria tied to their subcategory, such as follows:

- *HUBZone small businesses*: HUBZone small businesses must typically be at least 51% unconditionally and directly owned and controlled by U.S. citizens and have their principal office in a HUBZone.[12] At least 35% of their employees must also reside in a HUBZone.[13] A HUBZone is a Historically Underutilized Business (HUB) zone. HUBZone areas include census tracts or non-metropolitan counties with higher than average unemployment, or lower than average median household incomes; lands within Indian reservations; and base closure areas.[14]
- *Service-disabled veteran-owned small businesses*: An SDVOSB is a small business at least 51% unconditionally and directly owned and controlled by one or more service-disabled veterans, with both "service" and "veteran" carrying the meanings they have under the statutes governing veterans affairs.[15] A veteran is a person who served "in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable."[16] A disability is service-related when it "was incurred or aggravated ... in [the] line of duty in the active military, naval, or air service."[17]
- *Small businesses owned and controlled by socially and economically disadvantaged individuals that are participating in the Minority Small Business and Capital Ownership Development Program under Section 8(a) of the Small Business Act*:[18] "8(a) businesses," as these businesses are often called, must be "unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of the United States."[19] The business must also "demonstrate[] potential for success,"[20] which generally means that the business must have been in operation for at least two full years immediately prior to its application to the 8(a) Program.[21] Certain racial and ethnic minorities are presumed to be socially disadvantaged,[22] although other minorities and nonminorities are also eligible for the 8(a) Program if they can

[11] 13 C.F.R. §§ 121.101-121.108.

[12] 13 C.F.R. § 126.200(b)(1) & (3).

[13] 13 C.F.R. § 126.200(b)(4).

[14] 15 U.S.C. § 632(p)(1) & (4).

[15] 15 U.S.C. § 632(q)(1) & (4).

[16] 38 U.S.C. § 101(2).

[17] 38 U.S.C. § 101(16).

[18] Commonly known as the 8(a) Program, the Minority Small Business and Capital Ownership Development Program provides technical assistance and training, as well as contracting assistance, to 8(a) small businesses. For more on the 8(a) Program, see CRS Report R40744, *The "8(a) Program" for Small Businesses Owned and Controlled by the Socially and Economically Disadvantaged: Legal Requirements and Issues*, by (name redacted) and (name redacted).

[19] 13 C.F.R. § 124.101.

[20] *Id*.

[21] 13 C.F.R. § 124.107.

[22] 15 U.S.C. § 637(a)(5); 13 C.F.R. § 124.103(b)(1). This presumption is rebuttable and "may be overcome with credible evidence to the contrary." 13 C.F.R. § 124.103(b)(3).

prove individual social disadvantage by a preponderance of the evidence.[23] Alaska Native Corporations and Community Development Corporations are deemed or presumed to be economically disadvantaged for purposes of Section 8(a),[24] but all other applicants must show actual economic disadvantage. This can be done, in part, by producing evidence of diminished capital and credit opportunities, as well as personal net worth of no more than $250,000 at the time of entry into the 8(a) Program.[25] Businesses can generally participate in the 8(a) Program for no more than nine years.[26]

- *Small businesses owned and controlled by women*: Women-owned small businesses must be at least 51% owned by one or more women, with the management and daily operations of the business also controlled by one or more women.[27]

HUBZone and 8(a) businesses must also be certified by the SBA to be eligible for set-asides.[28] SDVOSBs can generally self-certify as to their eligibility,[29] while women-owned small businesses can either (1) be certified by a federal agency, state government, or national certifying entity approved by the SBA, or (2) self-certify and provide adequate documentation in accordance with standards set by the SBA.[30]

The categories of HUBZone, service-disabled veteran-owned, 8(a), and women-owned small businesses are not mutually exclusive. A business could potentially be both HUBZone and service-disabled veteran-owned, for example, although there is some variation among the eligibility requirements for the various programs, as **Table A-1** illustrates.

[23] 13 C.F.R. § 124.103(c)(1). Evidence must include (1) at least one objective distinguishing feature, such as race, gender, physical handicap, or geographic isolation, that has contributed to social disadvantage; (2) personal experiences of substantial and chronic social disadvantage in American society; and (3) negative impact on entry into or advancement in the business world because of the disadvantage. *See* 13 C.F.R. § 124.103(c)(2)(i)-(iii).

[24] *See* P.L. 102-415, § 10, 106 Stat. 2112 (October 14, 1992) (codified at 43 U.S.C. § 1626(e)); Small Disadvantaged Business Certification Application: Community Development Corporation (CDC) Owned Concern, OMB Approval No. 3245-0317 ("A Community Development Corporation (CDC) is considered to be a socially and economically disadvantaged entity if the parent CDC is a nonprofit organization responsible to residents of the area it serves which has received financial assistance under 42 U.S.C. 9805, et seq.").

[25] 13 C.F.R. § 124.104(c). This amount increases to $750,000 for purposes of continuing eligibility for the program. *See* 13 C.F.R. § 124.104(c)(2)(ii).

[26] 13 C.F.R. § 124.2. Participants may drop out of, or be terminated from, the 8(a) Program at any time before their ninth year of participation, but neither they nor their firms may participate in the program again after exiting it for any reason.

[27] 15 U.S.C. § 632(n).

[28] 13 C.F.R. § 124.112(b) (certifications for 8(a) small businesses); 13 C.F.R. § 126.200 (certifications for HUBZone small businesses).

[29] 13 C.F.R. § 125.15. Veteran-owned and service-disabled veteran-owned small businesses must, however, have their eligibility verified by the Department of Veterans Affairs (VA) in order to be eligible for certain preferences in VA contracts. *See* Veterans Benefits, Health Care, and Information Technology Act of 2006, P.L. 109-461, 120 Stat. 3403 (Dec. 22, 2006).

[30] 15 U.S.C. § 637(m)(2)(F)(i)-(ii).

Specific Set-Aside Programs

Small Businesses Generally

The Small Business Act, as amended, gives preference in certain government procurements to small businesses.[31] Under the act, acquisitions whose anticipated values are between $3,000 and $150,000[32] "*shall* be reserved exclusively for small business concerns" unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and with the quality and delivery of the goods and services being purchased.[33] Such acquisitions are conducted using "simplified acquisition procedures," including purchase orders, blanket purchase agreements, government-wide commercial purchase cards, and other authorized alternatives to sealed bids or negotiated offers.[34] In addition, acquisitions whose anticipated values exceed $150,000 "*shall*" be set aside for small businesses if the contracting office reasonably expects that (1) offers will be obtained from at least two responsible small businesses offering the products of different small businesses and (2) the award will be made at a fair market price.[35] These requirements—that the contracting officer reasonably expects that offers will be received from at least two responsible small businesses and that the award will be made at fair market price—are commonly known as the "rule of two" because of their focus on there being at least two small businesses.

When a total set-aside is not appropriate, an acquisition can generally still be partially set aside for small businesses if (1) the requirement is severable into two or more economic production runs or reasonable lots, (2) one or more small businesses are expected to have the technical competence and productive capacity to satisfy the set-aside portion of the requirement at a fair market price, and (3) the acquisition is not subject to simplified acquisition procedures.[36] Partial set-asides cannot be made when procuring construction work, however.[37]

If the conditions for a total or partial set-aside are not present, agencies can sometimes make sole-source awards to small businesses, or awards entered into or proposed by an agency after soliciting and negotiating with only one source. However, the Small Business Act does not authorize sole-source awards to small businesses that are not 8(a) participants or HUBZone or

[31] *See* 15 U.S.C. § 644; 48 C.F.R. § 19.502-2 & § 19.502-3.

[32] $150,000 is currently the "simplified acquisition threshold," or the maximum dollar value of an acquisition that may use simplified acquisition procedures. Simplified acquisition procedures allow use of purchase orders, blanket purchase agreements, government-wide commercial purchase cards, or other authorized methods in place of sealed bids or negotiated offers. *See* 41 U.S.C. § 403(11).

[33] 15 U.S.C. § 644(j)(1) (emphasis added). *See also* 48 C.F.R. § 19.502-2(a).

[34] For more on the simplified acquisition procedures, see generally CRS Report R40516, *Competition in Federal Contracting: An Overview of the Legal Requirements*, by (name redacted).

[35] 48 C.F.R. § 19.502-2(b) (emphasis added). When procuring the same goods or services over time, agencies generally do not have a legal obligation to award follow-on contracts through a small business set-aside just because a prior contract for those goods or services was awarded via a set-aside. *See, e.g.*, *RhinoCorps Ltd. v. United States*, 87 Fed. Cl. 261 (2009) (finding that the Air Force did not act unreasonably when it determined not to award a follow-on contract via a small business set-aside because its requirements had changed and it determined that two or more responsible small businesses would not submit offers). However, set-asides for 8(a) small businesses are somewhat different than other small business set-asides in that SBA must consent to the "release" of requirements from the 8(a) Program. *See* 13 C.F.R. § 124.504(e).

[36] 48 C.F.R. § 19.502-3(a)(1)-(4).

[37] 48 C.F.R. § 19.502-3(a).

service-disabled veteran-owned small businesses. Rather, any such awards are generally made under the authority of the Competition in Contracting Act, which permits sole-source awards when only one source can supply the goods or services or when other circumstances justify a sole-source award (e.g., unusual and compelling circumstances; brand-name commercial items for resale).[38]

HUBZone Small Businesses

Commonly known as the HUBZone Act, Title VI of the Small Business Reauthorization Act of 1997 established the set-aside program for HUBZone small businesses.[39] Initially, the HUBZone Act provided that

> 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.[40]

However, the 111th Congress amended the HUBZone Act by replacing "shall" with "may" when describing when HUBZone set-asides are to be used.[41]

Sole-source awards may also be made to HUBZone small businesses if (1) the business is determined to be responsible with respect to the performance of the contract and the contracting officer does not reasonably expect that two or more HUBZone businesses will submit offers; (2) the anticipated award will not exceed $4 million ($6.5 million for manufacturing contracts); and (3) in the estimation of the contracting officer, the award can be made at a fair and reasonable price.[42] In addition, HUBZone businesses are eligible for price evaluation adjustments of up to 10% in "full and open competitions," or competitions not set aside for HUBZone businesses.[43] The price evaluation adjustment authority allows an agency to decrease the price of a bid or offer from a HUBZone small business by up to 10% in determining which bid or offer has the lowest price or represents the best value for the government.[44]

Service-Disabled Veteran-Owned Small Businesses

The Veterans Benefits Act (VBA) of 2003 established the set-aside program for SDVOSBs.[45] Under the VBA, "a contracting officer *may* award contracts on the basis of competition restricted to" SDVOSBs if he or she reasonably expects that no less than two SDVOSBs will submit offers

[38] 48 C.F.R. §§ 6.302-1 to 6.302-7.

[39] *See* P.L. 105-135, Title VI, § 602(b)(1)(B), 111 Stat. 2629 (Dec. 2, 1997) (codified at 15 U.S.C. § 657a); 48 C.F.R. § 19.1305.

[40] 15 U.S.C. § 657a(b)(2)(B) (emphasis added).

[41] *See infra* notes 129-130 and accompanying text.

[42] 15 U.S.C. § 657a(b)(2)(A)(i)-(iii) (statutory requirements); 48 C.F.R. § 19.1306(a)(1)-(6) (increasing the price thresholds, among other things).

[43] 15 U.S.C. § 657a(b)(3).

[44] For example, if a non-HUBZone business bid $100,000 and a HUBZone small business bid $110,000, the HUBZone small business would win because, after its offer is reduced by 10% ($11,000), it is the lower bidder.

[45] *See* P.L. 108-183, Title III, § 308, 117 Stat. 2662 (Dec. 16, 2003) (codified at 15 U.S.C. § 657f); 48 C.F.R. § 19.1405.

and the award can be made at a fair market price.[46] Sole-source awards may also be made to SDVOSBs, as to HUBZone small businesses, when (1) the contracting officer does not reasonably expect that two or more SDVOSBs will submit offers; (2) the anticipated award will not exceed $3.5 million ($6 million for manufacturing contracts); and (3) in the estimation of the contracting officer, the award can be made at a fair and reasonable price.[47] However, SDVOSBs are not eligible for price evaluation preferences in full and open competitions, like HUBZone businesses are.

8(a) Small Businesses

Section 8(a) of the Small Business Act, as amended, is the basis for the set-asides for "small businesses owned and controlled by socially and economically disadvantaged individuals," which are also known as "8(a) small businesses."[48] Section 8(a) gives agencies "*discretion* to [award] ... contract[s]" for goods or services, or to perform construction work, to the SBA for subcontracting to 8(a) small businesses.[49] Once an agency's contract has been awarded to the SBA, it "*shall* be [subcontracted]" to certified 8(a) businesses.[50] This subcontracting must be done via a set-aside, with eligible 8(a) firms competing for the award, whenever (1) the "rule of two" is satisfied, (2) the anticipated value of the contract exceeds $4 million ($6.5 million for manufacturing contracts), and (3) the requirement has not been accepted by the SBA for award on a sole-source basis to a firm owned by an Indian tribe, Alaska Native Corporation (ANC), or, in the case of Department of Defense requirements, Native Hawaiian Organization (NHO).[51] Subcontracting may also be done via competitive set-asides for contracts whose anticipated value is less than $4 million ($6.5 million for manufacturing contracts) if the Director of the SBA's Office of Business Development approves.[52]

Awards can be made on a sole-source basis under the 8(a) Program, as under the HUBZone and SDVOSB programs, when (1) contracting officers determine that the 8(a) business is a responsible contractor with respect to the performance of the contract opportunity, (2) the award of the contract would be consistent with the business's business plan, and (3) the award would not result in the business exceeding the limits on firm value imposed on 8(a) participants.[53] The anticipated value of the contract must be $4 million or less ($6.5 million or less in the case of manufacturing contracts) unless the award is being made to a firm owned by an Indian tribe, an ANC, or, in the case of Department of Defense contracts, an NHO.[54] There are no limits on the anticipated value of contracts awarded on a sole-source basis to firms owned by these entities.

Like SDVOSBs, but unlike HUBZone small businesses, 8(a) small businesses are not eligible for price evaluation adjustments in full and open competitions. Here, however, unlike with the

[46] 15 U.S.C. § 657f(b) (emphasis added).

[47] 15 U.S.C. § 657f(a)(1)-(3) (statutory requirements); 48 C.F.R. § 19.1406(a) (increasing the price thresholds, among other things).

[48] *See* 15 U.S.C. § 637(a); 48 C.F.R. §§ 19.800-19.812.

[49] 15 U.S.C. § 637(a)(1)(A) (emphasis added).

[50] 15 U.S.C. § 637(a)(1)(D)(i) (emphasis added).

[51] *Id.*; 13 C.F.R. § 124.506(a)(i)-(iii); 48 C.F.R. § 19.805-1(a).

[52] 13 C.F.R. § 124.506(c).

[53] 15 U.S.C. § 637(a)(16)(A)(i)-(iii). *See* 15 U.S.C. § 636(j)(10)(I) (setting out the limits on firm value).

[54] 13 C.F.R. § 124.506(a)-(b).

SDVOSBs, there is arguably a legal reason that Congress does not presently give agencies the ability to make price evaluation adjustments to the bids or offers of 8(a) small businesses. Courts have found that making price evaluation adjustments for "small disadvantaged businesses," based, in part, on the presumption that minorities are disadvantaged, unconstitutionally deprives nonminority contractors of equal protection under the U.S. Constitution.[55]

Women-Owned Small Businesses

Section 8(m) of the Small Business Act, as amended, provides that the "contracting officer[s] *may* restrict competition for any contract for the procurement of goods and services by the Federal government to small business concerns owned and controlled by women" when certain conditions are met.[56] These conditions require that (1) eligible businesses be at least 51% owned by one or more women;[57] (2) the "rule of two" is satisfied; (3) the anticipated value of the contract will not exceed $3 million in the case of nonmanufacturing contracts, or $5 million in the case of manufacturing contracts; and (4) the proposed contract is for the procurement of goods or services in an industry in which the SBA has determined that women-owned small businesses are underrepresented.[58] Sole-source awards can be made to women-owned small businesses under the same circumstances as when they can be made to small businesses generally (i.e., only one responsible source and no other supplies or services will satisfy agency requirements).[59]

The requirement that the SBA identify industries in which women are underrepresented initially limited implementation of set-asides for women-owned small businesses. The SBA's first proposed rule regarding eligible industries identified only four such industries: (1) intelligence; (2) engraving and metalworking; (3) furniture and kitchen cabinet manufacturing; and (4) a limited category of motor vehicle dealers.[60] This proposed rule received significant criticism, including reported criticism from some Members of Congress, and the SBA revised it to include an additional 27 industries.[61] However, before this rule could be finalized, the U.S. Court of Appeals for the Federal Circuit issued its decision in *Rothe Development Corporation v. Department of Defense*, striking down a race-conscious contracting program on the grounds that there was insufficient evidence of discrimination in the defense industry before Congress when it

[55] *See, e.g.*, Rothe Dev. Corp. v. Dep't of Defense, 545 F.3d 1023 (Fed. Cir. 2008) (finding that Congress lacked sufficient evidence of racial discrimination in defense contracting when creating the Department of Defense's Small Disadvantaged Business Program). Had Congress had a "strong basis in evidence" when resorting to this race-conscious program, the outcome in *Rothe* could potentially have been different.

[56] *See* 15 U.S.C. § 637(m) (emphasis added).

[57] Regulations promulgated by the SBA clarify when set-asides may be made to economically disadvantaged women-owned small businesses and when they may be made to other women-owned small businesses. *See U.S. Small Bus. Admin.,* Women-Owned Small Business Federal Contract Program: Proposed Rule, 75 Fed. Reg. 10030 , 10031-32 (Mar. 4, 2010).

[58] 15 U.S.C. § 637(m)(2)(A)-(F) & (m)(4).

[59] *See* 48 C.F.R. § 6.302-1.

[60] U.S. Small Bus. Admin., Proposed Rule: Women-Owned Small Business Federal Contract Assistance Procedures, 72 Fed. Reg. 73285 (December 27, 2007).

[61] *See, e.g.*, Sens. Snowe, Dole Offer Bill to Overhaul Rule on Women-Owned Small Business Set Asides, 89 *Fed. Conts. Rep.* 180 (February 19, 2008) (describing legislation proposed in response to the rule); Robert Brodsky, SBA Issues New Proposal on Small Business Program, But Same Questions Remain, *Government Executive.com*, September 30, 2008, *available at* http://www.govexec.com/dailyfed/0908/093008rb1.htm (noting that the SBA proposed to increase the number of industries in which women are "substantially underrepresented" from 4 to 31).

created the program.[62] Although gender-conscious programs are subject to "intermediate" scrutiny, not strict scrutiny like the race-conscious program at issue in *Rothe*, the SBA extended the comment period on the proposed rule in order to "review[]" how the evidence underlying its determinations regarding the industries in which women are underrepresented might fare under *Rothe's* standards for a "strong basis in evidence."[63] Then, on March 11, 2009, Congress enacted the Omnibus Appropriations Act, 2009, which temporarily prohibited implementation of "the rule relating to women-owned small business Federal contract assistance procedures published in the Federal Register on October 1, 2008."[64] However, in March 2010, the Obama Administration issued proposed regulations establishing the infrastructure for the women-owned small business set-aside program and identifying additional industries in which women are underrepresented or substantially underrepresented.[65] These regulations identified 83 industries in which women are underrepresented or substantially underrepresented. They were finalized on October 7, 2010, and took effect on February 11, 2011.[66]

Section 8(m) does not authorize special sole-source awards to women-owned small businesses. Thus, such awards can only be made to women-owned small businesses in the same circumstances in which they can be made to other businesses under the authority of CICA (e.g., unusual and compelling circumstances; brand-name commercial items for resale; national security).[67] Women-owned small businesses are also not eligible for price evaluation preferences in unrestricted competitions.

Developments in the Law Regarding Set-Asides

In 2008-2010, the Court of Federal Claims and GAO issued a series of decisions in bid protests that could have significantly affected the law regarding set-asides for small businesses by (1) giving HUBZone set-asides precedence over 8(a) and, potentially, other set-asides and (2) subjecting task and delivery orders under multiple-award indefinite-delivery/indefinite-quantity (ID/IQ) contracts to set-asides. A bid protest is a formal, written objection to an agency's solicitation for bids or offers, cancelation of a solicitation, or award or proposed award of a contract.[68] Bid protests can only be made in one of three forums: (1) the procuring agency; (2) GAO; and (3) the Court of Federal Claims.[69] GAO has historically been the largest bid protest

[62] *Rothe Dev. Corp*., 545 F.3d at 1049. *See generally* CRS Report R40440, *Rothe Development Corporation v. Department of Defense: The Constitutionality of Federal Contracting Programs for Minority-Owned and Other Small Businesses*, by (name redacted) and (name redacted).

[63] U.S. Small Bus. Admin., The Women-Owned Small Business Federal Contracting Assistance Procedures: Eligible Industries, 74 Fed. Reg. 1153 (January 12, 2009).

[64] P.L. 111-8, Administrative Provisions—Small Business Administration, § 522, 123 Stat. 673 (Mar. 11, 2009) ("None of the funds made available under this Act may be used by the Small Business Administration to implement the rule relating to women-owned small business Federal contract assistance procedures published in the Federal Register on October 1, 2008 (73 Fed. Reg. 56940 et seq.)."). Similar provisions do not appear to have been included in the Consolidated Appropriations Act, 2010, P.L. 111-117.

[65] 75 Fed. Reg. 10030 et seq.

[66] Small Bus. Admin., Women-Owned Small Business Federal Contract Program: Final Rule, 75 Fed. Reg. 62258 (Oct. 7, 2010).

[67] *See supra* note 8.

[68] 31 U.S.C. § 3551(1)(A)-(D).

[69] 31 U.S.C. § 3551. Certain specific issues relating to the award of federal contracts are protested to other agencies, rather than the bid-protest forums. Size determinations for small businesses, for example, are protested with the SBA. (continued...)

forum. However, because GAO is a legislative-branch agency, the "separation of powers" doctrine prevents its recommendations from being legally binding upon executive-branch agencies.[70] Rather, agencies must notify GAO within 65 days after receiving its recommendations if they do not intend to implement them,[71] and GAO, in turn, notifies four committees of Congress.[72] In contrast, unless reversed on appeal to the U.S. Court of Appeals for the Federal Circuit or through a grant of certiorari by the Supreme Court, Court of Federal Claims decisions are the law, and agencies could be found in contempt if they fail to implement the court's orders.

However, the 111th Congress has enacted legislation responding to the court and GAO decisions. The Small Business Jobs Act (P.L. 111-240), signed by President Obama on September 27, 2010, amends the Small Business Act to remove the language underlying the finding that HUBZone set-asides have precedence over other set-aside programs, as well as clarifies that multiple-award contracts *are* subject to small business set-asides.

Precedence Among Small Business Set-Asides

Prior to the first GAO decision finding that HUBZone set-asides had precedence, there had long been uncertainty about which set-aside program agency officials should use in awarding specific contracts.[73] Statutes and the Federal Acquisition Regulation (FAR) provided for certain precedence in government procurement. Namely:

1. Procurements from prison workshops or severely disabled individuals under 18 U.S.C. §§ 4124-4125 or the Javits-Wagner-O'Day Act take priority over small business set-aside programs.[74]
2. HUBZone set-asides "take[] priority" over set-asides for small businesses generally.[75]
3. Small business set-asides "do not preclude awards" to SDVOSBs, which must at least be considered before setting aside the award for small businesses generally.[76]

(...continued)

See 13 C.F.R. § 121.1001.

[70] *See* Ameron, Inc. v. U.S. Army Corps of Eng'rs, 809 F.2d 979, 986 (3d Cir. 1986).

[71] 31 U.S.C. § 3554(b)(3).

[72] 31 U.S.C. § 3554(b)(3) (Senate Committee on Homeland Security and Governmental Affairs, Senate Committee on Appropriations, House Committee on Oversight and Government Reform, House Committee on Appropriations).

[73] *See, e.g.*, Dep't of Defense, Gen. Servs. Admin., Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation: FAR Case 2006-034, Socioeconomic Program Parity: Proposed Rule, 73 Fed. Reg. 12699, 12699 (March 10, 2008) ("It has been unclear to the acquisition community if there is an order of precedence that applies when deciding whether to satisfy a requirement through an award to small business, HUBZone small business, service-disabled veteran-owned small business, or a small business participating in the 8(a) Business Development Program.").

[74] *See, e.g.*, 48 C.F.R. § 19.502-1(b) (set-asides for small businesses generally); 15 U.S.C. § 657a(b)(4) (HUBZone program); 15 U.S.C. § 657f(c) (SDVOSB program).

[75] 48 C.F.R. § 19.501(c) ("For acquisitions exceeding the simplified acquisition threshold, the requirement to set aside an acquisition for HUBZone small business concerns ... takes priority over the requirement to set aside the acquisition for small business concerns."); 48 C.F.R. § 19.1305(a) (same).

[76] 48 C.F.R. § 19.800(e) ("Before deciding to set aside an acquisition in accordance with Subpart 9.5, 19.13, or 19.14, the contracting officer should review the acquisition for offering under the 8(a) Program."); 48 C.F.R. § 19.501(d) (same).

4. Requirements currently being performed by an 8(a) business, or that SBA has accepted for performance under the authority of the 8(a) Program, are excluded from the HUBZone and SDVOSB set-aside programs unless the SBA consents to release the requirements from the 8(a) Program.[77]
5. "Priority" in set-asides for small businesses generally "shall be given" to small businesses that perform a substantial portion of the production on the proposed contracts within areas of concentrated unemployment or underemployment, or within labor surplus areas.[78]

However, these provisions did not address which type of set-aside agencies should use when the conditions for multiple types of set-asides exist (e.g., when there are at least two responsible HUBZone small businesses and two responsible SDVOSBs offering goods or services at fair market price). Given the lack of clear precedence among the set-aside programs, the SBA historically asserted that "[t]here is no order of precedence" among the programs and suggested that agencies should select among the set-aside programs in order to maximize their performance on their goals for contracting with small businesses.[79] The Court of Federal Claims and GAO, however, have disagreed with SBA's interpretation of the Small Business Act, as discussed below.

DGR Associates, Inc. v. United States

In its August 13, 2010, decision in *DGR Associates*, the Court of Federal Claims permanently enjoined the government from using an 8(a) set-aside when there is a reasonable expectation that at least two qualified HUBZone small businesses will submit offers and the award can be made at a fair market price.[80] In so doing, the court relied heavily on the interpretation of the Small Business Act provided in its earlier decision in *Mission Critical Solutions v. United States*,[81] discussed below, whose key points it summarized as follows:

- Because the relevant sections of the Small Business Act are "unambiguous," the SBA's interpretation of that act, which provides for parity among the set-aside programs, is not entitled to deference.[82]
- The language in the Small Business Act specifying that "[n]otwithstanding any other provision of law, a contract opportunity shall be awarded" via a HUBZone

[77] 48 C.F.R. § 19.1304(d) (HUBZone exclusions); 48 C.F.R. § 19.1404(d) (SDVOSB exclusions).

[78] 15 U.S.C. § 644(d).

[79] *See, e.g.*, U.S. Small Bus. Admin., Small Business Size Regulations; Government Contracting Programs; HUBZone Program: Proposed Rule, 67 Fed. Reg. 3826, 3832 (January 28, 2002) ("[I]f the contracting activity has met 0% of its HUBZone goals and has met its 8(a) goals, then the contracting officer should [set aside the procurement for HUBZone small businesses]"). On March 10, 2008, the Civil Agency Acquisition Council and Defense Acquisition Regulations Council proposed amending the FAR so that it reflected the SBA's view that there is "parity," not precedence, among the 8(a), HUBZone, and SDVOSB set-aside programs. 73 Fed. Reg. at 12700. The comment period on this proposed rule ended May 9, 2008, but a final rule was never promulgated. The SBA itself had previously proposed a rule that would have established parity between the 8(a) and HUBZone set-aside programs, but never finalized it. 67 Fed. Reg. at 3832.

[80] *DGR Assocs*., 94 Fed. Cl. at 194 ("With the issuance of this decision, the Court permanently enjoins Defendant from proceeding with the contract unlawfully awarded to General Trade & Services, and from awarding any contract that is not in compliance with the Small Business Act as interpreted herein.").

[81] *Id*. at 205 ("The Court sees no need to modify the detailed, analytical and persuasive reasoning of the Chief Judge [as articulated in *Mission Critical Solutions*].").

[82] *Id*. at 204-06.

set-aside whenever the rule of two is satisfied clearly indicates "Congress' intent to supersede *all* other laws and prioritize the HUBZone program over other Small Business Act programs."[83]

- The legislative history of the HUBZone Act relied upon by the government is insufficient to rebut the "presumption that the plain language of the statute expresses congressional intent."[84]

Despite its comparatively brief discussion of the Small Business Act, the court's decision was significant because it articulates, more clearly than the decision in *Mission Critical Solutions*, that the government was enjoined from making not only the award challenged in this protest but also other awards based on the same interpretation of the Small Business Act. The court further suggested that, where "parity" among the set-aside programs is concerned, the executive branch "would be better served to seek legislative relief from Congress rather than judicial relief in this Court."[85]

Mission Critical Solutions v. United States

A March 2, 2010, decision by the Court of Federal Claims in *Mission Critical Solutions* had similarly held that HUBZone set-asides have precedence over 8(a) set-asides,[86] but the Obama Administration had construed this decision as enjoining only the particular award at issue in the protest.[87] Three provisions of the Small Business Act—two in the HUBZone Act and one in Section 8(a)—were key to the court's decision. First, the court construed language in the HUBZone Act regarding set-asides "[n]otwithstanding any other provision of law" to mean that the "provisions of the 'notwithstanding' section override conflicting provisions of any other section," including those regarding 8(a) set-asides.[88] In so finding, the court rejected the government's argument that the phrase "notwithstanding any other provision of law" need not be construed literally.[89] It did so because it found that the cases the government relied upon in support of this argument involved statutes which clearly indicated that certain provisions were to be excluded from the application of the "notwithstanding" provisions and were thus distinguishable from the Small Business Act.[90] The court also found that language in 15 U.S.C. § 657a(b)(4) regarding the relationship between the HUBZone program and the Federal Prison

[83] *Id*. at 205-07. The court specifically rejected the argument that the "notwithstanding" language here referred only to "provisions outside of the Small Business Act that otherwise might frustrate the authority of a contracting officer to award a contract to a HUBZone concern." *Id*. at 206. It further noted that, because the "nothstanding" clause directly precedes the "shall" clause, the HUBZone Act cannot be construed to give HUBZone set-asides preference over only HUBZone sole-source awards. *Id*. at 207-08.

[84] *Id*. at 207-09 (noting that this legislative history provides no explanation for the deletion of a proposed parity provision from the Senate version of the HUBZone Act and that one Representative's expressions of concern about the potential effect of HUBZone set-asides on 8(a) set-asides cannot be construed to mean that Congress wished the programs to have parity with one another).

[85] *Id*. at 194.

[86] *Mission Critical Solutions*, 91 Fed. Cl. at 410.

[87] *See* U.S. Department of Justice, Civil Division, Re: Mission Critical Solutions v. United States, No. 09-864 (Fed. Cl.) (Feb. 26, 2010), Mar. 17, 2010 (letter on file with the author). *See also infra* note 112 and accompanying text.

[88] *Mission Critical Solutions*, 91 Fed. Cl. at 403 (quoting *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993)).

[89] *Id*. at 396-97 (relying on *Or. Natural Res. Council v. Thomas*, 92 F.3d 792, 796-97 (9th Cir. 1996) and *In re Glacier Bay*, 944 F.2d 577, 582 (9th Cir. 1991)).

[90] *Id*. at 397.

Industries and Javits-Wagner-O'Day programs indicated that "if Congress wished to establish the relationship of the HUBZone program to another contracting preference program, it knew how to do so."[91] Second, the court construed the use of "shall" in the HUBZone Act to indicate mandatory agency actions, and its absence in Section 8(a) to indicate discretionary agency actions.[92] It rejected the government's argument that HUBZone set-asides are only mandatory in comparison to HUBZone sole-source awards and that, notwithstanding the use of "shall" or "may" in a statute, the court may consider "indications of legislative intent to the contrary or obvious inferences from the structure or purpose of the statute."[93] Finally, the court construed the language in Section 8(a) about contracts "offered for award pursuant to this section" as further indicating that 8(a) awards are discretionary.[94] It found similar language—and discretion—lacking in the HUBZone Act.[95]

The court gave no weight to the alleged parity accorded to the various set-aside programs under 15 U.S.C. § 637(d) and 15 U.S.C. § 644(g), which, respectively, require certain prime contractors to agree to plans for subcontracting with small businesses and establish government-wide and agency-specific goals for the percentage of federal contract and subcontract dollars awarded to small businesses.[96] The court was not persuaded by the government's argument that the lack of mention of precedence among the set-aside programs in these sections indicated parity.[97] It felt that these provisions indicated only that Congress did not provide for precedence among the set-asides programs *in these sections* of the Small Business Act.[98] The court also gave no weight to those aspects of the legislative history that the government claimed indicated that Congress intended there to be parity among the set-aside programs.[99] It noted that examination of the legislative history is not necessary when the statutory language is clear because "[t]he language of the statute is the best indication of Congress's intent."[100] However, it also noted that key evidence in the government's resort to legislative history did not necessarily carry the significance that the government attributed to it. For example, it said that deletion of proposed language regarding parity among the set-aside programs from the HUBZone Act when it was enacted could have meant that Congress did not intend for the set-aside programs to have parity.[101] Its deletion did

[91] *Id*. at 399.

[92] *Id*. at 402-04.

[93] *Id*. at 403. The government specifically relied upon *Ky., Educ. Cabinet, Dep't for the Blind v. United States*, 424 F.3d 1222, 1227 (Fed. Cir. 2005) ("Congress's use of the two terms 'may' or 'shall' does not end the analysis. … [The Court may consider] indications of legislative intent to the contrary or [] obvious inferences from the structure and purpose of the statute.").

[94] *Id*. at 404-06.

[95] *Id*.

[96] *Id*. at 395-96.

[97] *Id*. at 396 ("Defendant argues that because § 644(g) 'demonstrates that Congress intended that the goals of both programs were to be pursued concurrently' and § 637(d)(1) 'treats the programs as co-equal,' the SBA's regulations providing for parity between the HUBZone and 8(a) programs are permissible.").

[98] *Id*.

[99] *Id*. at 406-10.

[100] *Id*. at 409-10 (quoting *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1345 (Fed. Cir. 2004)).

[101] *Id*. at 408-09. The Senate version of the Small Business Reauthorization Act of 1997, which included the HUBZone Act, originally contained a provision titled "Parity Relationship," which stated that the HUBZone provisions "shall not limit the discretion of a contracting officer to let any procurement contract to [SBA] under section 8(a)." 143 Cong. Rec. 18118 (1997). The House removed the entirety of the HUBZone Act from its version of the Small Business Reauthorization Act of 1997. The Senate reinstated the HUBZone Act, but without the parity provision, and this version of the Small Business Reauthorization Act was eventually enacted. 143 Cong. Rec. 24094-108.

not necessarily mean that Congress construed the statute as providing for parity, in the court's view.[102]

The court also rejected the government's argument that Congress "acquiesced to the SBA's parity regulations, and has affirmatively adopted the OLC legal opinion" because of language included in the conference report on the National Defense Authorization Act (NDAA) for FY2010.[103] The version of the NDAA passed by the Senate would have substituted "may" for "shall" in the HUBZone Act,[104] but this language was omitted by the conferees because

> … the Department of Justice has concluded that no change to the Small Business Act is required to ensure that contracting officers of the Department of Defense and other federal agencies have the discretion whether or not to award contracts pursuant to the HUBZone program. The conferees direct the Secretary of Defense to continue to administer the HUBZone program in a manner consistent with the Department of Justice opinion.[105]

The court did not find this purported "acquiescence" determinative. Instead, it noted that congressional statements about the proper interpretation of a statute made subsequent to its enactment are "of little persuasive authority."[106] Further, the court gave no deference to SBA regulations providing for parity among the set-aside programs[107] because it found these regulations were not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[108] According to the court, because the statute's plain meaning is apparent and "Congress has directly spoken to the precise question at issue," the SBA's interpretation of the statute is given no deference, especially when it is at variance with the statutory language.[109]

Based upon this analysis, the court enjoined the Army from making the proposed award to an 8(a) firm and ordered it to determine whether a HUBZone set-aside is required.[110] However, it did not explicitly enjoin the government from making future awards based on the SBA's "parity rule,"[111]

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[102] *Mission Critical Solutions*, 91 Fed. Cl. at 408. The court also noted that statements of Members of the House of Representatives expressing concerns about possible precedence of HUBZone set-asides over 8(a) set-asides "at most offered evidence of the intent of the House, not of Congress." *Id*.

[103] *Id*. at 408-09.

[104] S. 1390, 111th Cong., § 838, as engrossed.

[105] H.Rept. 111-288, at 789 (2009). *See also* Matthew Weigelt, Congress Keeps HUBZone Priority—for Now, *Wash. Tech*., October 9, 2009, *available at* http://washingtontechnology.com/blogs/acquisitive-mind/2009/10/hubzone-shall-stands-its-ground.aspx?s=wtdaily_131009 ("The fiscal 2010 National Defense Authorization Act conference report didn't include the one-sentence provision that would have put small businesses in historically underutilized business zones, or economically depressed areas, on the same level as small businesses in the Small Business Administration's 8(a) program and those owned by service-disabled veterans.").

[106] *Mission Critical Solutions*, 91 Fed. Cl. at 409 (relying on *Chevron*, 467 U.S. 837 (1984)). Under *Chevron*, when a court reviews an agency's formal interpretation of a statute that the agency administers, and when the statute has not removed agency discretion by compelling a particular disposition of the matter at issue, courts defer to any reasonable agency interpretation.

[107] The SBA regulations then in effect provided for parity among the set-aside programs only implicitly in that they treated the various set-aside programs the same and did not provide for precedence. The SBA had previously proposed, but never finalized, a regulation that would have expressly provided for parity among the set-aside programs. *See supra* note 79.

[108] *Mission Critical Solutions*, 91 Fed. Cl. at 410-12.

[109] *Id*. at 412.

[110] *Id*.

[111] On the other hand, nothing in Part III of the court's decision suggested its application of principles of statutory construction to the Small Business Act was limited to the procurement in question. Moreover, language in Part IV of its (continued...)

and the Director of the Commercial Litigation Branch of the Civil Division at the U.S. Department of Justice (DOJ) subsequently stated that the court's injunction "applie[d] only to the specific contract at issue in this case and not to operation of the SBA's parity rule more generally."[112] Agencies were thus instructed to continue applying the parity rule in their other procurements.

The Obama Administration also appealed the Court of Federal Claims decision to the U.S. Court of Appeals for the Federal Circuit.[113]

GAO Decisions

Prior to and concurrent with the Court of Federal Claims decisions, GAO also issued a series of decisions in which it construed the Small Business Act in the same way as the Court of Federal Claims. The first of these was its May 4, 2009, decision in *Mission Critical Solutions*, wherein it recommended that HUBZone set-asides be given precedence over 8(a) set-asides.[114] The Obama Administration declined to implement this recommendation, in part, because the Office of Legal Counsel (OLC) at the DOJ found that the provisions of the Small Business Act regarding the set-aside programs are ambiguous and the SBA regulations providing for parity among the set-aside programs constituted reasonable interpretations of the governing statute.[115] The Army thus

(...continued)

decision, providing the "remedy" of injunctive relief, arguably suggested the court intended its interpretation of the Small Business Act to apply outside the procurement in question. *See Mission Critical Solutions*, 91 Fed. Cl. at 411 ("Plaintiff has succeeded on the merits of this case. The court has examined the statutory language of the Small Business Act and concluded that the mandatory language of the HUBZone statute requires that a contracting officer first determine whether the specified criteria are met before awarding a contract under another small business program or on a sole-source basis.").

[112] *See* Re: Mission Critical Solutions, *supra* note 87.

[113] Mission Critical Solutions v. United States, No. 2010-5099 (appeal docketed Apr. 2, 2010).

[114] Mission Critical Solutions, 2009 U.S. Comp. Gen. LEXIS 86 at *15. GAO specifically contrasted the language of 15 U.S.C. § 657a(b)(2), which states that "[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," with that of 15 U.S.C. § 637(a)(1)(A), which states that:

> [i]t shall be duty of the [SBA] and it is hereby empowered, whenever it determines such action is necessary or appropriate … to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers obligating the [SBA] to furnish articles, equipment, supplies, services, or materials to the Government or to perform construction work for the Government. In any case in which the [SBA] certifies to any officer of the Government having procurement powers that the [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 the [SBA] upon such terms and conditions as may be agreed upon between the [SBA] and the procurement officer.

GAO denied SBA's request for reconsideration of this decision. *See* Small Business Administration—Reconsideration, B-401057.2 (July 6, 2009), *available at* http://www.gao.gov/decisions/bidpro/4010572.pdf.

[115] Office of Legal Counsel, Department of Justice, Permissibility of Small Business Administration Regulations Implementing the Historically Underutilized Business Zone, 8(a) Business Development, and Service-Disabled Veteran-Owned Small Business Concern Programs, Aug. 21, 2009, at 5-6, 13, *available at* http://www.usdoj.gov/olc/2009/sba-hubzone-opinion082109.pdf. In reaching the conclusion that the Small Business Act was ambiguous as to whether all contracts must be awarded via HUBZone set-asides when the rule of two is met or whether only contracts designated for the HUBZone program must be awarded via a set-aside when the rule of two is met, OLC focused on the phrase "pursuant to this section" used in the HUBZone Act. *Id*. at 6-7. It concluded that this phrase, which GAO (continued...)

proposed to proceed with the contract award that Mission Critical Solutions had challenged in its GAO protest,[116] prompting Mission Critical Solutions to file suit in federal court.[117]

GAO later issued other decisions recommending that HUBZone set-asides be given precedence over 8(a) set-asides. The earliest of these decisions, a November 4, 2009, decision in *All Seasons Apparel, Inc.*, evidenced some sympathy for procuring agencies that have received "conflicting guidance" from OLC, the Office of Management and Budget, and GAO regarding precedence among the set-aside programs.[118] However, its May 14, 2010, decision in *DGR Associates* indicated that it would decide future protests raising the issue of HUBZone precedence "in an expedited and summary manner."[119] GAO also awarded the protester in *DGR Associates* its fees and costs in filing the protest,[120] which are not routinely awarded to prevailing protesters.[121] When the Obama Administration declined to follow the recommendations GAO made in this protest, DGR Associates filed suit in federal court, leading to the decision by the Court of Federal Claims that was previously discussed. Most recently, in *Rice Services, Inc.*, GAO reaffirmed its recommendation that agencies give HUBZone set-asides precedence over other set-asides and awarded the protester filing fees and attorney costs.[122]

In its September 19, 2008, decision in *International Program Group, Inc.*, GAO had also recommended that HUBZone set-asides be given precedence over set-asides for SDVOSBs for the same reason.[123] The Obama Administration also declined to implement this

(...continued)

apparently did not consider in its decision meant that set-asides are only mandatory as compared to sole-source awards within the HUBZone program. *Id*. at 7 (referencing *Clark v. Arizona*, 548 U.S. 735, 755 n.24 (2006) (recognizing the "usual rule of statutory construction" to "giv[e] effect, if possible, to every clause and every word of a statute")). Relatedly, OLC noted that the mandatory language regarding set-asides for HUBZone businesses in 15 U.S.C. § 657a(b)(2)(B) should be read in contrast with discretionary language regarding sole-source awards to HUBZone businesses in 15 U.S.C. § 657a(b)(2)(A), not in contrast to language in the statutes establishing the 8(a) or SDVOSB set-aside programs. *Id*. OLC also concluded that the language in the HUBZone Act giving prison workshops and nonprofit agencies for the blind and "severely disabled" priority over HUBZone small businesses highlights the absence of a similar provision preferring HUBZone set-asides over set-asides for other small businesses. *Id*. Finally, OLC noted that the statute establishing the 8(a) set-aside program (15 U.S.C. § 637(a)) included similar mandatory language, as well as the phrase "pursuant to this section," which "makes it difficult to argue that the HUBZone provision unambiguously mandates that HUBZone awards be given priority over 8(a) awards." *Id*. at 8. OLC discounted the phrase "notwithstanding any other provision of law," found at the beginning of the statutory provision addressing HUBZone set-asides, as "best read to qualify the substantive requirement that follows." *Id.* at 9. It concluded that this phrase did not, in itself, establish the precedence of HUBZone set-asides. *Id*. Prior to the issuance of the OLC opinion, the Office of Management and Budget had directed agencies to maintain parity among the set-aside programs pending an "Executive Branch review of the legal basis underlying the GAO's decisions." Executive Office of the President, Office of Mgmt. & Budget, Recent Government Accountability Office Decisions Concerning Small Business Programs, July 10, 2009, *available at* http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-23.pdf.

[116] *Mission Critical Solutions*, 91 Fed. Cl. at 391.

[117] *Id*.

[118] All Seasons Apparel, Inc., B-401805, B-401805.2, 2009 U.S. Comp. Gen. LEXIS 206, at * 2 (Nov. 4, 2009) (finding the Army's decision to cancel the solicitation was not unreasonable "[g]iven the conflicting views expressed in GAO's legal decisions and the Executive Branch directives, the threat of litigation from competing small business interests, and the availability of another procurement vehicle to meet at least some of the agency's requirements").

[119] DGR Associates, Inc., B-402494, 2010 U.S. Comp. Gen. LEXIS 95 (May 14, 2010).

[120] *DGR Assocs*., 94 Fed. Cl. at 193.

[121] *See* 4 C.F.R. § 21.8(d)(1)-(2).

[122] B-403746, B-403746.2 (Sept. 16, 2010).

[123] International Program Group, Inc., B-400278; B-400308, 2008 U.S. Comp. Gen. LEXIS 193 (September 19, 2008).

recommendation,[124] but no litigation appears to have challenged whether HUBZone set-asides had precedence over SDVOSB set-asides.

Legislative Response to the Court and GAO Decisions

Had agencies been required to give HUBZone set-asides precedence over 8(a) or other set-asides, certain small businesses could have had decreased opportunities to obtain federal contracts, while agencies could have experienced difficulties in meeting their goals for contracting with certain types of small businesses.[125] Currently, the government-wide goal is that 3% of federal contract and subcontract dollars go to HUBZone small businesses, while 5% of federal contract and subcontract dollars go to 8(a) small businesses and 3% go to SDVOSBs.[126] Achieving the 8(a) and SDVOSB goals, in particular, could have been difficult if agencies had to use a HUBZone set-aside whenever the contract officer reasonably expected that at least two qualified HUBZone small businesses would submit offers and the award could be made at a fair market price. Moreover, HUBZone set-asides could also potentially have been found to have similar precedence over set-asides for women-owned small businesses once these set-asides were implemented, because the Small Business Act uses "may" when talking about setting aside procurements for women-owned small businesses.[127]

Given these potential effects of the court and GAO decisions, which some Members and commentators viewed as contrary to Congress's intent,[128] the 111th Congress amended the Small Business Act to remove the language that the courts and GAO relied upon in finding that HUBZone set-asides have precedence over other set-asides. The Small Business Jobs Act of 2010 (P.L. 111-240), which President Obama signed on September 27, 2010, amends the HUBZone Act so that it states that "[a] contracting opportunity *may* 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 the award can be made at a fair market price."[129] The act also deleted the words "[n]othwithstanding any other provision of law," which had formerly introduced the provisions authorizing contracting officers to make awards to HUBZone small businesses on a sole-source or set-aside basis.[130]

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[124] Permissibility of Small Business Administration Regulations, *supra* note 115.

[125] Commentators made these points regarding the earlier GAO decisions recommending that HUBZone set-asides have precedence over 8(a) and SDVOSB set-asides. *See, e.g.*, HUBZone Council, GAO Gives HUBZone Program Priority over Service Disabled Veteran Owned Firms, November 6, 2008, *available at* http://www.ppi-timezero.com/resource-documents/hubzonerelease.pdf (hailing the decision's potential impact on HUBZone small businesses); SBA Warns of Turmoil without Parity Rule, *Entrepreneur.com*, November 7, 2008, *available at* http://www.entrepreneur.com/tradejournals/article/189159380.html (warning that HUBZone companies "could receive a disproportionate share of set-aside contracts, squeezing out other groups").

[126] 15 U.S.C. § 644(g)(1). There are also agency-specific goals, which tend to be set at 3% and 5% of contract dollars for HUBZone and 8(a) small businesses, respectively. *See* U.S. Small Bus. Admin., FY2008 Goals and Achievements, *available at* http://www.sba.gov/idc/groups/public/documents/sba_homepage/fy2008goals_and_achievements.html.

[127] *See* 15 U.S.C. § 637(m) ("In accordance with this subsection, a contracting officer *may* restrict competition for any contract for the procurement of goods or services by the Federal Government to small business concerns owned and controlled by women if ...") (emphasis added).

[128] *See* H.Rept. 111-288, at 789 (2009).

[129] P.L. 111-240, § 1347(b)(1) (emphasis added).

[130] *Id*. at § 1347(c).

However, because the act only applies to procurements conducted on or after its date of enactment, the government could potentially still be found to have improperly failed to give precedence to HUBZone set-asides in procurements conducted prior to September 27, 2010. Additionally, although the act is widely described as "ensuring" parity among set-aside programs,[131] it does not amend the Small Business Act so that it expressly provides for parity.[132] Nonetheless, the act, as amended, can be construed as allowing for parity by failing to provide for precedence, and the Federal Acquisition Regulatory Council promulgated regulations in 2011 that explicitly establish that there is parity among the various set-aside programs. These regulations provide that

> There is no order of precedence among the 8(a) Program (subpart 19.8), HUBZone Program (subpart 19.13), Service-Disabled Veteran-Owned Small Business (SDVOSB) Procurement Program (subpart 19.14), or the Women-Owned Small Business (WOSB) Program (subpart 19.15).[133]

They also establish that "small business set-asides have priority over acquisitions using full and open competition."[134]

Award of Costs in Protests Prior to Enactment of P.L. 111-240

At least one court has awarded attorneys' fees, costs, and expenses under the Equal Access to Justice Act (EAJA) to a protester who challenged the government's interpretation of the Small Business Act, as it existed prior to the enactment of P.L. 111-240. In its February 15, 2011, decision in *DGR Associates, Inc. v. United States*, the U.S. Court of Federal Claims awarded the protester its costs because the government's position in the prior litigation "was not substantially justified."[135] The fact that the government does not prevail in litigation does not necessarily mean that its position was not substantially justified.[136] However, the court found that the government position here was "not reasonable" because the "statutory language was unambiguous," and "multiple courts and the GAO uniformly had held that" set-asides for HUBZone small businesses had precedence over those for 8(a) small businesses.[137]

[131] *See, e.g.*, Senate Passes Bill Meant to Increase Small Business Access to Federal Contracts, 94 *Fed. Cont. Rep.* 269 (Sept. 21, 2010).

[132] The word "parity" is not among those added to the Small Business Act by P.L. 111-240. Rather, "parity" is used only in the title of that section of P.L. 111-240 that introduces the amendments made to the Small Business Act (i.e., the substitution of "may" for "shall" and the deletion of the "notwithstanding" clause).

[133] 48 C.F.R. § 19.203(a).

[134] 48 C.F.R. § 19.203(d).

[135] 97 Fed. Cl. 214, 217 (2011).

[136] *See, e.g.*, Schock v. United States, 254 F.3d 1, 5 (1st Cir. 2001). The Government bears the burden of showing that its position was substantially justified. *See, e.g.*, Infiniti Info. Solutions, LLC v. United States, 94 Fed. Cl. 740, 748 (2010).

[137] 97 Fed. Cl. at 219.

Set-Asides Under Indefinite-Delivery/Indefinite-Quantity Contracts

In its decision in *Delex Systems, Inc.*, issued on October 8, 2008, GAO determined that task and delivery orders issued under multiple-award indefinite-delivery/indefinite-quantity (ID/IQ) contracts are subject to set-asides for small businesses generally.[138] Unlike with other contracts, the government does not commit to purchasing a specific quantity of goods or services when entering an ID/IQ contract.[139] Rather, under an ID/IQ contract, the government and the contractor(s) agree that the government will issue orders for the delivery of supplies or services to the contractor(s) during the period of the contract.[140] ID/IQ contracts are said to be "multiple-award" when the government awards the contract to multiple contractors, which are then able to compete for task or delivery orders under the contract. An ID/IQ contract that is not multiple-award is single-award, meaning that only one firm is eligible for task or delivery orders under it.

Delex Systems had protested the Department of the Navy's request for delivery orders under a multiple-award ID/IQ contract.[141] The Navy proposed to allow all firms awarded the contract to compete for task orders, a course of action that Delex said was improper given the requirements in Section 19.502-2(b) of the FAR.[142] Section 19.502-2(b) provides that:

> [t]he contracting officer shall set aside any acquisition over [$150,000] for small business participation when there is a reasonable expectation that (1) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns ... and (2) award will be made at fair market prices. Total small business set-asides shall not be made unless such a reasonable expectation exists.[143]

The Navy countered, in part, that Section 19.502-2(b) does not apply to ID/IQ contracts because of language in Section 16.505(b)(1)(ii) of the FAR specifying that the competition requirements of Part 6 of the FAR—which include the requirement that agencies comply with Section 19.502-2(b)—do not apply to the ordering process.[144] Set-asides are part of the competition requirements because the Competition in Contracting Act of 1984, in part, authorizes them.[145]

GAO disagreed. It found that Section 16.505(b)(1)(ii), which purportedly exempts task and delivery orders from the competition requirements, means only that agencies do not need to engage in full and open competition when issuing orders.[146] Outside of this exemption, agencies must comply with the rest of the competition requirements, including set-asides for small businesses. This is, in part, because Section 19.502-2(b) applies to "any acquisition over

[138] Delex Sys., Inc., B-400403, 2008 U.S. Comp. Gen. LEXIS 170 (October 8, 2008).

[139] 48 C.F.R. § 16.501-1. A certain minimum quantity must be guaranteed in an ID/IQ contract for there to be the "consideration," or bargained-for-exchange, necessary for a binding contract between the government and the contractor. Some ID/IQ contracts also provide for maximum quantities.

[140] *Id*.

[141] Delex Sys., 2008 U.S. Comp. Gen. LEXIS 170 at *8.

[142] *Id*.

[143] 48 C.F.R. § 19.505-2(b).

[144] Delex Sys., 2008 U.S. Comp. Gen. LEXIS 170 at *10-*11.

[145] *See supra* notes 8-9.

[146] Delex Sys., 2008 U.S. Comp. Gen. LEXIS 170 at *15.

$150,000," and orders under ID/IQ contracts are acquisitions.[147] Thus, assuming they are over $150,000, as the Navy's task and delivery orders were, task and delivery orders are subject to set-asides for small businesses generally.[148]

Legislative Response to the GAO Decision

The Small Business Jobs Act of 2010 (P.L. 111-240) also amended the Small Business Act in response to this GAO decision, granting agencies explicit authority to set aside multiple-award contracts, or orders thereunder, for small businesses in a manner consistent with GAO's decision. Under P.L. 111-240, agencies may

> (1) set aside part or parts of a multiple award contract for small business concerns, including the subcategories of small business concerns …;
>
> (2) notwithstanding the fair opportunity requirements under section 2304c(b) of title 10, United States Code, and section 303J(b) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253j(b)), set aside orders placed against multiple award contracts for small business concerns, including the subcategories of small business concerns …; and
>
> (3) reserve 1 or more contract awards for small business concerns under full and open multiple award procurements, including the subcategories of small business concerns.[149]

The "fair opportunity requirements" mentioned here generally require that all contractors holding a multiple-award contract have a "fair opportunity to be considered" for orders issued under it.

The effects of this legislation, along with the earlier GAO decision, on the percentage of federal contract dollars awarded to small businesses generally are hard to assess, largely because it is presently unclear whether and how agencies might restructure their procurements in response to it. On its face, the legislation, like the *Delex* decision, might give small businesses "a new edge in government contracting" because it would ensure that at least some orders under multiple-award ID/IQ contracts are set aside for competitions in which only small businesses may compete.[150] Small businesses would not have to compete with medium-sized or large businesses for these orders, and a small business would be assured of winning the order. However, some commentators predict that these changes could be less beneficial to small businesses than they initially appear because they "could stress the relationships between [small businesses] and agencies," and they might lead agencies to abandon multiple-award ID/IQ contracts in favor of other contracting vehicles.[151] These commentators fear that agencies could come to view multiple-award ID/IQ contracts as less desirable because such contracts would require multiple competitions, one for the award of the contract and another for each task or delivery order under the contract, with each competition creating the possibility of bid protests and concomitant delays

[147] *Id*. at *18.

[148] *Id*. at *21-*22.

[149] P.L. 111-240, § 1331 (codified at 15 U.S.C. § 644(r)).

[150] Matthew Weigelt, Ruling Buttresses Small Businesses; Yet Favorable "Rule of Two" Decision Could Come at a High Cost, *Wash. Tech.*, December 8, 2008, *available at* http://washingtontechnology.com/Articles/2008/12/04/Ruling-buttresses-small-businesses.aspx.

[151] *Id*. ("Agencies will reassess the advantages of multiple-award contracts because of the GAO's ruling. ... They might ask themselves why they should go through the hassle of awarding an ID/IQ and then go through another competition for task orders.") (quoting Ray Bjorklund, senior vice president and chief knowledge officer at FedSources Inc.).

in agency activities.[152] Such perceptions could potentially cause agencies to rely on single-award ID/IQs, where possible; the Federal Supply Schedule, assuming it is not also subject to small business set-asides;[153] or other contract types.

[152] There could also be delays occasioned by agencies' conducting market research to determine whether the "rule of two" is satisfied (i.e., that there are at least two responsible small businesses offering goods or services at fair market price).

[153] GSA responded to the *Delex* decision, in part, by asserting that contracts under its Federal Supply Schedule are not subject to set-asides for small businesses. *See* GSA Memorandum from David A. Drabkin, Senior Procurement Executive, to All GSA Contracting Activities, October 28, 2008), quoted in Arnold & Porter LLP, GAO's Delex Decision and GSA's Response: The Clash of Titans, *available at* http://www.arnoldporter.com/resources/documents/CA_GAOsDelexDecision&GSAsResponse_012609.pdf.

Appendix. Programs for Small Businesses

Table A-1. An Overview of the Requirements and Components of the Various Set-Aside Programs

	General Requirements	Set-Asides	Sole-Source Awards	Price Eval. Adjustment
Small businesses generally (15 U.S.C. § 644; 48 C.F.R. §§ 19.502-2 & 19.502-3)	Independently owned and operated Not dominant in its field of operations Meets size standards	**$3,000-$150,000**: exclusively reserved for small businesses ≥ **$150,000**: set-asides for small businesses where rule of two met	Only one responsible source and no other supplies or services will satisfy agency requirements	n/a
HUBZone small businesses (15 U.S.C. § 657a; 48 C.F.R. § 19.1305)	51% unconditionally and directly owned and controlled by US citizens Principal office in HUBZone At least 35% of employees reside in HUBZone	≥ **$150,000** Rule of two satisfied	Business responsible and two or more HUBZones not reasonably expected to submit offers ≤ **$4 million** (non-manufacturing contracts) or ≤ **$6.5 million** (manufacturing contracts) Award can be made at fair and reasonable price	Up to 10%
Service-disabled veteran owned small businesses (15 U.S.C. § 657f; 48 C.F.R. § 19.1405)	51% unconditionally and directly owned and controlled by service-disabled veteran	≥ **$150,000** Rule of two satisfied	Two or more SDVOSBs not reasonably expected to submit offers ≤ **$3.5 million** (non-manufacturing contracts) or ≤ **$6 million** (manufacturing contracts) Award can be made at a fair and reasonable price	n/a
8(a) small businesses (15 U.S.C. §637(a); 48 C.F.R. §§ 19.800-19.812)	Unconditionally owned and controlled by one or more socially and economically disadvantaged individuals of good character and US citizens Demonstrated potential for success → generally in operation for at least two years prior to applying to 8(a) Program Accepted into 8(a) Program; time limits on 8(a) participation (9 yrs.)	Rule of two satisfied Competition generally required when contract ≥ **$ 4 million** (non-manufacturing contracts), or ≥ **$ 6.5 million** (manufacturing contracts) unless the contract; may be used with contracts at lower prices	Business a responsible contractor with respect to the performance of the contract opportunity Award of the contract consistent with the business's business plan Award would not result in the business exceeding limits on firm value No other supplies or services will satisfy agency requirements Contract ≤ **$4 million** (non-manufacturing	n/a

	General Requirements	Set-Asides	Sole-Source Awards	Price Eval. Adjustment
			contracts), or ≤ **$6.5 million** (manufacturing contract), unless an Indian Tribe, Alaska Native Corporation, or, in the case of DOD contracts, Native Hawaiian Organization is involved	
Women-owned small businesses (15 U.S.C. § 637(m))	51% owned by women, with management and daily operations also controlled by women	≥ **$150,000** Rule of two satisfied Eligible business at least 51% owned by one or more women who are economically disadvantaged ≤ **$3 million** (non-manufacturing contracts), or ≤ **$5 million** (manufacturing contracts) Proposed contract for an industry where SBA has determined that women are substantially underrepresented	Only one responsible source and no other supplies or services will satisfy agency requirements	n/a

Source: Congressional Research Service.

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