



ACQUISITION,  
TECHNOLOGY  
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE  
3000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3000

MAY 18 2010

MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS  
COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES TRANSPORTATION  
COMMAND (ATTN: ACQUISITION EXECUTIVE)  
DEPUTY ASSISTANT SECRETARY OF THE ARMY  
(PROCUREMENT)  
DEPUTY ASSISTANT SECRETARY OF THE NAVY  
(ACQUISITION & LOGISTICS MANAGEMENT)  
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE  
(CONTRACTING)  
DIRECTORS, DEFENSE AGENCIES  
DIRECTORS, DOD FIELD ACTIVITIES

SUBJECT: Small Business Administration Parity Regulation

On July 10, 2009, the Office of Management and Budget (OMB) issued the attached memorandum referencing Small Business Administration "parity" regulations. This continues to be the Executive Branch policy and components should follow the OMB guidance and all applicable regulations. We will advise of any changes or updates. Also attached is a letter dated March 17, 2010, from the Department of Justice Civil Division to the Deputy General Counsel, SBA, responding to his question regarding the scope of the injunction entered by the Court of Federal Claims in Mission Critical Solutions v. United States. The Justice Department advised that the injunction applies only to the specific contract at issue in the case and not to the operation of SBA's parity rule more generally. DoJ filed a notice of appeal from this decision on March 17, 2010, also attached.

My staff point of contact for this matter is Linda K. Heartley, who can be reached at 703-693-7062 or linda.heartley@osd.mil.

Shay D. Assad  
Director, Defense Procurement  
and Acquisition Policy

Attachments:  
As stated



THE DIRECTOR

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

July 10, 2009

M-09-23

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Peter R. Orszag  
Director

SUBJECT: Recent Government Accountability Office Decisions Concerning Small Business Programs

This memorandum provides guidance to Executive Branch agencies regarding two decisions by the Government Accountability Office (GAO) addressing the relationship among three small business programs: the 8(a) Business Development (BD) program, the Service Disabled Veteran Owned Small Business (SDVOSB) program, and the Historically Underutilized Business Zone (HUBZone) program. The GAO's decisions in question are Mission Critical Solutions, of May 4, 2009 (B-401057, 2009 CPD ¶ 93), and International Program Group, Inc., of September 19, 2008 (B-400278, B-400308, 2008 CPD ¶ 172).

The GAO's decisions are not binding on Federal agencies and are contrary to regulations promulgated by the Small Business Administration (SBA) that provide for "parity" among the three small business programs. An Executive Branch review of the legal basis underlying the GAO's decisions has been initiated, and the results of that review are expected this month. Pending the results of the review, the applicable SBA "parity" regulations remain binding and in effect as validly-promulgated implementations of the governing statutes.

If agencies were to follow the GAO decisions, the Federal Government's efforts to procure goods and services from 8(a) small businesses and from SDVOSB through the other statutory programs may be negatively impacted. In particular, the analysis the GAO offered in Mission Critical Solutions and International Program Group would, if followed, significantly limit the discretion contracting officers have historically possessed in deciding whether an agency will use 8(a) BD, SDVOSB, or HUBZone small business programs to satisfy an agency's acquisition requirement. Under the GAO's reading of the statutes governing these programs, a Federal agency must use a HUBZone small business for an acquisition if the agency's contracting officer has a reasonable expectation that at least two qualified HUBZone small businesses will submit offers and that the award can be made at a fair market price. That is, an agency adhering to the GAO's approach would, in such circumstances, be required to procure from a HUBZone small business even in a case where an 8(a) BD small business is currently providing the goods or services to the agency or where SBA has accepted the requirement for award through the 8(a) BD program.

Pending the completion of the legal review of the GAO's decisions by the Executive Branch, the SBA's "parity" regulations should not be disregarded by contracting officers, and Federal agencies should not, as a result of the GAO's decisions, be compelled to prioritize HUBZone small businesses over 8(a) BD or SDVOSBs. Instead, until the legal review is completed, Federal agencies should continue to give active consideration to each small business program pursuant to their pre-existing contracting practices and "parity" policies.



U.S. Department of Justice

Civil Division

1100 L Street, N.W.

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Washington, D.C. 20530

March 17, 2010

Michael A. Chodos  
Deputy General Counsel  
U.S. Small Business Administration  
Washington, D.C. 20416

Re: Mission Critical Solutions v. United States,  
No. 09-864 (Fed. Cl.) (Feb. 26, 2010)

Dear Mr. Chodos,

This letter responds to your question regarding the scope of the injunction entered by the Court of Federal Claims in Mission Critical Solutions v. United States. As explained below, the injunction applies only to the specific contract at issue in this case and not to operation of the SBA's parity rule more generally.

As you know, in Mission Critical, focusing upon 15 U.S.C. § 657a(b)(2), the Court of Federal Claims considered whether the Small Business Act requires that the government consider whether there is a reasonable expectation that not less than two qualified HUBZone small business concerns will submit offers and whether a contract award may be made to a qualified HUBZone small business at a fair market price before a contract may be awarded under another small business program or on a sole-source basis. Slip. Op. at 33. Based upon its interpretation that the statute required such consideration, the Court provided the following relief:

[t]he court declares unlawful the Army's procurement actions in making the sole source award . . . [at issue in that case] without first determining whether a set-aside for HUBZone small business concerns was required under the HUBZone statute. The court orders defendant to determine whether the criteria of 15 U.S.C. § 657a(b)(2)(B) are met, such that the contract opportunity at issue in this case must be awarded on the basis of competition among qualified HUBZone small business concerns. See 15 U.S.C. §

657a(b)(2)(B). The court enjoins the United States from awarding the IT support services contract at issue in a manner that is not in compliance with the Small Business Act as the court here interprets it.

Slip. Op. at 35.

By its express terms, the injunction entered by the Court applies to the specific procurement decision and to the specific contract at issue in the litigation. In our view, the injunction reflects the nature of the Court's jurisdiction, which, in brief, as relevant here, is defined by its authority "to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1).

If you have any additional questions, please free to contact me at (202) 514-7300 or Kirk Manhardt at (202) 353-0541.

Very truly yours,

  
Jeanne E. Davidson  
Director

Commercial Litigation Branch

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS  
(BID PROTEST)**

MISSION CRITICAL SOLUTIONS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 09-864C
	)	(Chief Judge Emily C. Hewitt)
UNITED STATES,	)	
	)	
Defendant,	)	
	)	
	)	

**NOTICE OF APPEAL**

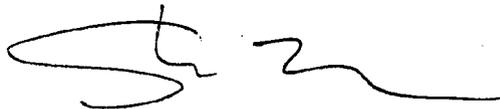
Notice is hereby given that the defendant, the United States, in the above named case hereby appeals to the United States Court of Appeals for the Federal Circuit from the final judgment entered in this action on March 4, 2010.

Respectfully submitted,

TONY WEST  
Assistant Attorney General

JEANNE E. DAVIDSON  
Director

  
PATRICIA M. MCCARTHY  
Assistant Director



STEVEN M. MAGER  
Trial Attorney  
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Tele: (202) 616-2377  
Steven.Mager@usdoj.gov

March 17, 2010

Attorneys for Defendant

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury that on March 17, 2010, I caused to be served by electronic and regular mail copies of "NOTICE OF APPEAL" addressed as follows:

John Tolle  
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