



Decision

Matter of: Small Business Administration–Reconsideration

File: B-401057.2

Date: July 6, 2009

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DIGEST

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

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

DECISION

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

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

We deny the request for reconsideration.

BACKGROUND

Our decision in Mission Critical Solutions, supra, addressed the statutory requirements for the HUBZone and 8(a) programs, and the SBA regulations that implement these programs. The HUBZone Program was established by Title VI of the Small Business Reauthorization Act of 1997, Pub. L. No. 105-135, to provide federal contracting assistance to qualified small business concerns located in historically underutilized business zones in an effort to increase employment opportunities, investment, and economic development in those areas. See Federal Acquisition Regulation (FAR) § 19.1301(b). Section 602(b)(1)(B) of the Act provides as follows:

[N]otwithstanding any other provision of law . . . a contract opportunity shall be awarded pursuant to this section on the basis of competition restricted to qualified HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price.

15 U.S.C. § 657a (emphasis added).

Based on the statute's use of the phrase "shall be awarded," we have interpreted this language to mean that a HUBZone set-aside is mandatory where the enumerated conditions are met. International Program Group, Inc., B-400278, B-400308, Sept. 19, 2008, 2008 CPD ¶ 172 at 5.

The statutory language authorizing the 8(a) program differs from the language authorizing the HUBZone program in that it gives the contracting agency the discretion to decide whether to offer a contracting opportunity to the SBA for the 8(a) program. In this connection, the statute provides:

In any case in which [SBA] certifies to any officer of the Government having procurement powers that [SBA] is competent and responsible to perform any specific Government procurement contract to be let by any such officer, such officer shall be authorized in his discretion to let such procurement contract to [SBA] upon such terms and conditions as may be agreed upon between [SBA] and the procurement officer.

15 U.S.C. § 637(a)(1)(A) (2006).

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

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

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

13 C.F.R. § 126.605.

¹ As discussed in our prior decision, the SBA had accepted the IT support services at issue here into the SBA’s 8(a) program and authorized the Army to negotiate directly with MCS. These negotiations led to the award of a 1-year contract to MCS on a sole-source basis. When the agency began its planning for a follow-on contract, the anticipated value of the contract was greater than \$3.5 million; thus, the agency decided that a sole-source award to MCS was precluded under FAR § 19.805-1. As relevant here, FAR § 19.805-1 states that—unless the SBA accepts the requirement on behalf of a concern owned by an Indian tribe or an Alaska Native Corporation—an acquisition under the 8(a) program must be awarded on the basis of competition limited to eligible 8(a) firms if: (1) there is a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers, and that award can be made at a fair market price; and (2) the anticipated total value of the contract, including options, will exceed \$3.5 million (for non-manufacturing acquisitions). The Army then determined that Copper River, an 8(a) Alaska Native Corporation firm, was capable of performing the requirement, and, with the SBA’s approval, awarded a sole-source contract to that company.

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

DISCUSSION

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

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

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

GAO’s Statutory Authority to Decide Bid Protests

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

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

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

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

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

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

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

Effect of “Notwithstanding” Language on Other Small Business Programs

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

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

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

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

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

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

The Contract Management Decisions

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

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

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

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

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

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

The request for reconsideration is denied.

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Acting General Counsel