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**Comptroller General  
of the United States**

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

## **Decision**

**Matter of:** DGR Associates, Inc.

**File:** B-402494

**Date:** May 14, 2010

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

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### **DIGEST**

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

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### **DECISION**

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

We sustain the protest.

### **BACKGROUND**

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

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

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

## DISCUSSION

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

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

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

<sup>2</sup> The SBA regulations in question, 13 C.F.R. §§ 126.605, 126.606, 126.607, essentially provide that HUBZone set-asides are not required even where the criteria specified in 15 U.S.C. § 657a(b)(2)(B) are satisfied if the requirement has previously been performed by an 8(a) contractor or the contracting officer has chosen to offer the requirement to the 8(a) program.

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

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

## RECOMMENDATION

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

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

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

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

The protest is sustained.

Lynn H. Gibson  
Acting General Counsel