

CONTRACTING PROGRAM “PARITY,” RECENT COURT DECISION, AND PROPOSED NEXT STEPS

BACKGROUND:

Under SBA’s Parity policy and regulations, before setting aside a contract for small businesses, federal agency contracting officers may choose among SBA’s procurement and business development programs [8(a), HUBZone, Service Disabled Veteran-owned small business (SDVOSB), and the soon-to-be Women-owned small business (WOSB¹) programs], without giving one preference over the others.

In Mission Critical v. U.S. (09-864 C, Ct. of Fed Claims, Feb. 26, 2010), the Court of Federal Claims held that the Small Business Act requires contract opportunities to be set aside for HUBZone firms whenever two HUBZone firms are available to perform the contract at a fair price.² The Department of Justice has appealed the decision and will be reviewed de novo by the Court of Appeals for the Federal Circuit.

In a protest decision arising out of an Air Force contract, the Government Accountability Office (GAO) has made clear that it believes HUBZone small businesses are entitled to absolute contracting priority over 8(a) in all cases where two or more HUBZones are available to perform the task. At present, GAO has taken the position that it will decide ALL HUBZone protests in favor of this absolute HUBZone priority on a summary, expedited basis.

SBA strongly supports legislation to clarify and reiterate Congress’s original intent not to prioritize one small business program over another. SBA is aware of legislation that would clarify parity (S. 3190 and H.R. 3729).

POTENTIAL IMPACT OF THESE DECISIONS:

- Potentially undermines program opportunities for socially and economically disadvantaged, SDVOSBs and WOSBs
- Substantial federal contracting dollars potentially will **NOT** go to non-HUBZone 8(a) (socially and economically disadvantaged small businesses), SDVOSBs, or WOSBs.
- Based on contracting data for FY2008, **\$29.3 BILLION** went to SDBs (of which **\$16.2 BILLION** went to 8(a) firms); **\$14.7 BILLION** to WOSBs; and **\$6.5 BILLION** to SDVOSBs.
- The Court of Federal Claims’s reading of the Act, if applied to other procurements, could re-direct to HUBZone firms **tens of BILLIONS** in federal procurement dollars currently spread across small businesses, including HUBZone, 8(a), SDVOSBs, and WOSBs.
- An absolute HUBZone preference could have a devastating economic impact upon thousands of non-HUBZone 8(a), SDVOSB and WOSB firms that currently participate in government contracting, and the hundreds of thousands of jobs they provide.
- This could cause a flood of protests in any non-HUBZone procurement, paralyzing the procurement process and making litigation avoidance a primary contracting objective.

SBA’S POSITION ON NEXT ACTIONS:

1. SBA supports substituting “shall” with “may” in Section 31(b)(2)(B) of the Small Business Act to clarify and confirm contracting officers’ discretion to treat SBA’s programs in parity with one another
2. Message to the contracting community that Mission Critical controls only the contract at issue in the Mission Critical procurement and the SBA’s regulations remain in force. The Administration maintains a firm commitment to the principle of parity while Congress considers potential statutory clarifications

¹ SBA is currently analyzing comments for the proposed Women-owned small business contracting rule that is expected to be promulgated in final form during 2010.

² Although the holding is limited to the facts and parties involved in that particular case, the concern is that contracting officers, fearing protests, litigation and related uncertainty, will feel bound by the decision in any event.

OTHER KEY FACTS:

- Time is of the essence in clarifying parity since a significant share of spending takes place in the final four months of the Fiscal Year (June – September). In FY 2008, nearly 40% of all contract dollars were obligated in the final 4 months.
- There is significant overlap between the industries in which HUBZone firms receive contracts and the industries in which SDB, SDVOSBs, and WOSBs receive contracts.
 - Nearly 40% of SDB dollars are in the 10 largest industries for HUBZone firms.
 - The largest SDVOSB NAICS code (building construction) is also the largest HUBZone NAICS code.
 - 30% of women-owned small business contracts are in the 10 largest HUBZone industries.