



Decision

Matter of: Rice Services, Inc.

File: B-403746

Date: September 16, 2010

William R. Purdy, Esq., Bradley Arant Boult Cummings LLP, for the protester.
LTC Won K. Lee and Christopher S. Cole, Esq., Department of the Air Force, for the agency.

Eric M. Ransom, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In accordance with DGR Assocs., Inc., B-402494, May 14, 2010, 2010 CPD ¶ 115, protest is summarily sustained where contracting agency declined to consider whether to set aside solicitation for competition limited to Historically Underutilized Business Zone small business concerns in reliance on the August 21, 2009 Memorandum Opinion by the Office of the Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice.

DECISION

Rice Services, Inc., of Smithville, Tennessee, a Historically Underutilized Business Zone (HUBZone) small business concern, protests the terms of solicitation No. FA4800-10-R-0003, issued by the Department of the Air Force for mess attendant services at Langley Air Force Base, Virginia.

We sustain the protest.

The Air Force issued the solicitation on August 16, 2010, as a set-aside for competition among section 8(a) small business concerns. Rice Services filed this protest on August 31, arguing that the procurement should instead be set aside for competition limited to HUBZone small business concerns. In this regard, Rice Services asserts that the conditions for a mandatory HUBZone set-aside exist, citing the HUBZone statute, 15 U.S.C. § 657a, Federal Acquisition Regulation (FAR)

§ 19.1305(a), and our decision in DGR Assocs., Inc., B-402494, May 14, 2010, 2010 CPD ¶ 115.

Our Office has considered this issue in several prior protests, including DGR Assocs., Inc., *supra* (which also involved a procurement by the Air Force); Mission Critical Solutions, B-401057, May 4, 2009, 2009 CPD ¶ 93, *recon. denied*, Small Business Admin.–Recon., B-401057.2, July 6, 2009, 2009 CPD ¶ 148; and International Program Group, Inc., B-400278, B-400308, Sept. 19, 2008, 2008 CPD ¶ 172. In each decision, our Office has concluded that the HUBZone statute requires procuring agencies to set aside procurements for HUBZone small business concerns when the conditions set forth in the statute are met.

In our most recent decision on this issue, DGR Assocs., Inc., the Air Force explained that it had decided not to set aside the procurement for HUBZone small business concerns in reliance on a Memorandum Opinion by the Office of the Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice (DOJ), stating disagreement with our decisions and concluding that the Small Business Act does not require the prioritization of the HUBZone program in the manner that our Office has determined. *See* DOJ Memorandum Opinion, Aug. 21, 2009, at 2. The DOJ Memorandum states that “the SBA’s regulations [creating parity between the HUBZone program and other small business set-aside programs] . . . are reasonable [and are] binding on all Executive Branch agencies, notwithstanding any GAO decisions to the contrary.” *Id.* at 13.

The DOJ Memorandum notwithstanding, our Office concluded in DGR Assocs., Inc., as in prior decisions, that the plain language of the HUBZone statute requires an agency to set aside an acquisition for competition restricted to qualified HUBZone small business concerns where the conditions set forth in the HUBZone statute are met. We also advised that, going forward, protests raising the sole issue of HUBZone set-aside priority would be addressed in an “expedited and summary manner” where the agency acted contrary to our decisions in reliance on the DOJ Memorandum Opinion. DGR Assocs., Inc., *supra*, at 4.

Accordingly, after Rice Services filed its current protest, we requested that the Air Force inform our Office whether it had acted in reliance on the DOJ Memorandum Opinion. The Air Force responded that “[consistent] with our prior position, the Air Force intends to follow the Memorandum Opinion issued by the Office of the Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, concluding that there is no statutory requirement to prioritize the HUBZone small business program.” Air Force Letter to GAO, Sept. 10, 2010, at 1.

As explained in our prior decisions, we 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 decision 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 consider whether the conditions for setting aside a procurement for HUBZone small business concerns 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.

RECOMMENDATION

In making our recommendation, we recognize, as the DOJ Memorandum Opinion 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).

Accordingly, 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. 4 C.F.R. § 21.8(d)(1) (2010). Rice Services should submit its claim for protest costs directly to the Air Force within 60 days of receipt of this decision.

The protest is sustained.

Lynn H. Gibson
Acting General Counsel