



## GOVERNMENT CONTRACTS

### SMALL BUSINESS STATISTICS AND RECENT DECISIONS

September 2010

#### Small Business Administration Reports

In its annual report to Congress on August 27, 2010, the United States Small Business Administration (“SBA”) announced that the federal Government awarded \$96.8 billion in prime contracts to small businesses in Fiscal Year (“FY”) 2009. This represented a \$3.6 billion increase over FY 2008. The total percentage of all federal contracts awarded to small business rose to 21.9% in FY 2009, which, even though an improvement, still falls short of the government-wide statutory goal of 23%.

Under the Small Business Act, Congress established government-wide small business contracting goals for the various small business programs established under the Act. 15 U.S.C. § 644(g)(1). The Act establishes both prime contracting and subcontracting goals as follows:

	Prime Contract Awards	Subcontract Awards
Small Business	23%	N/A
Small Disadvantaged	5%	5%
Woman-owned	5%	5%
Service Disabled	3%	3%
HUBZone	3%	3%

Overall, the government is only meeting the statutory goals for disadvantaged small business with 7.57% of prime contracts being awarded to firms that qualify as disadvantaged. Other programs where agencies fell short include Woman-Owned small businesses (3.68%), Service Disabled Veteran Owned small businesses (1.98%) and HUBZone (2.81%).

Similarly, federal agencies made improvements over FY 2008 results in all categories of small business subcontracting. As a whole in FY 2009, the federal government met its subcontracting goal for Woman-Owned small businesses (5.44%). It fell short, however, in subcontracts to Disadvantaged small business (4.49%), Service-disabled Veteran Owned small business (1.29%) and HUBZone (1.71%).

More information, including SBA’s performance scorecards on each agency’s efforts towards meeting their small business goals is available on the SBA’s website at: <http://www.sba.gov/aboutsba/sbaprograms/goals/SCORECARD2009.html>.

## Caselaw Decisions

In two recent decisions, the United States Court of Federal Claims has confirmed that HUBZone contractors must be given priority over other small business programs. See *Mission Critical Solutions v. United States*, 91 Fed. Cl. 386 (2010) *appeal docketed*, No. 2010-5099 (Fed. Cir. Apr. 2, 2010); see also *DGR Assoc. Inc. v. United States, et al.*, \_\_\_ Fed. Cl. \_\_\_, No. 10-396C, 2010 WL 3211156 (Fed. Cl.) (Aug. 13, 2010). Those cases involved bid protests challenging the Government’s decision to award a contract pursuant to the 8(a) program rather than conduct the competition as a HUBZone set aside. The legal question presented to the Court of Federal Claims was whether the Small Business Act creates a statutory preference which requires the Government to favor HUBZone procurements to any other small business program. In both cases, the Court of Federal Claims held that it does, interpreting the Act to require agencies to set aside a procurement for HUBZone contractors whenever a contracting officer has a reasonable expectation that two or more HUBZone contractors will submit offers and the award can be made a fair market price – *i.e.*, the “rule of two.”

Notably, after the Government Accountability Office (“GAO”) issued the initial protest decision in *Mission Critical Solutions*, B-401057, Sept. 19, 2009, 2009 CPD ¶ 93, concluding that the Act creates a priority for HUBZone contractors, both the Office of Management and Budget (“OMB”) and the Department of Justice, Office of Legal Counsel weighed in and reached the opposite conclusion. OMB went so far as to advise agencies not to follow the GAO’s decision.

Notwithstanding OMB’s position, the *DGR* Court held:

On the issue of statutory interpretation, the language of the Small Business Act granting priority to the HUBZone program could not be more clear. By using the phrases “notwithstanding any other provision of law . . . a contract opportunity shall be awarded on the basis of competition to qualified HUBZone small business concerns,” Congress established a priority for the HUBZone program over other competing small business programs. See 15 U.S.C. § 657a(b) (2)(B).

*Id.* at 2-3.

As noted above, the *Mission Critical Solutions* case is currently on appeal to the Federal Circuit, which may reach a different conclusion. The Government may also seek legislative relief by asking Congress to change the Small Business Act. Until that happens, based on these two decisions, it is clear that the Court of Federal Claims will enjoin any award that fails to give HUBZone contractors preference over other small business contractors.



FOR MORE INFORMATION, CONTACT:



**Kevin M. Bernys** is a member in Dickinson Wright's Bloomfield Hills office and can be reached at 248.433.7234, or [kbernys@dickinsonwright.com](mailto:kbernys@dickinsonwright.com).