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OFFICE OF MANAGEMENT AND BUDGET
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THE DIRECTOR

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MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Peter R. Orszag
Director

SUBJECT: Recent Government Accountability Office Decisions Concerning Small Business Programs

This memorandum provides guidance to Executive Branch agencies regarding two decisions by the Government Accountability Office (GAO) addressing the relationship among three small business programs: the 8(a) Business Development (BD) program, the Service Disabled Veteran Owned Small Business (SDVOSB) program, and the Historically Underutilized Business Zone (HUBZone) program. The GAO's decisions in question are Mission Critical Solutions, of May 4, 2009 (B-401057, 2009 CPD ¶ 93), and International Program Group, Inc., of September 19, 2008 (B-400278, B-400308, 2008 CPD ¶ 172).

The GAO's decisions are not binding on Federal agencies and are contrary to regulations promulgated by the Small Business Administration (SBA) that provide for "parity" among the three small business programs. An Executive Branch review of the legal basis underlying the GAO's decisions has been initiated, and the results of that review are expected this month. Pending the results of the review, the applicable SBA "parity" regulations remain binding and in effect as validly-promulgated implementations of the governing statutes.

If agencies were to follow the GAO decisions, the Federal Government's efforts to procure goods and services from 8(a) small businesses and from SDVOSB through the other statutory programs may be negatively impacted. In particular, the analysis the GAO offered in Mission Critical Solutions and International Program Group would, if followed, significantly limit the discretion contracting officers have historically possessed in deciding whether an agency will use 8(a) BD, SDVOSB, or HUBZone small business programs to satisfy an agency's acquisition requirement. Under the GAO's reading of the statutes governing these programs, a Federal agency must use a HUBZone small business for an acquisition if the agency's contracting officer has a reasonable expectation that at least two qualified HUBZone small businesses will submit offers and that the award can be made at a fair market price. That is, an agency adhering to the GAO's approach would, in such circumstances, be required to procure from a HUBZone small business even in a case where an 8(a) BD small business is currently providing the goods or services to the agency or where SBA has accepted the requirement for award through the 8(a) BD program.

Pending the completion of the legal review of the GAO's decisions by the Executive Branch, the SBA's "parity" regulations should not be disregarded by contracting officers, and Federal agencies should not, as a result of the GAO's decisions, be compelled to prioritize HUBZone small businesses over 8(a) BD or SDVOSBs. Instead, until the legal review is completed, Federal agencies should continue to give active consideration to each small business program pursuant to their pre-existing contracting practices and "parity" policies.