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Location-Based Preferences in Federal and Federally Funded Contracting: An Overview of the Law

Abstract
[Excerpt] The recession that began in December 2007 has prompted increased interest among some Members of Congress and their constituents in legal authorities that could require or allow federal agencies to prefer contractors in one state or locality over those in other states or localities. Federal spending on procurement contracts has remained high, reaching $523.9 billion in FY2009, at a time when many other businesses have scaled back their purchases of goods and services. However, this spending has historically been localized in three to five states, which receive nearly half of all federal procurement dollars, prompting concerns about whether other states receive their "fair share." Such concerns may be overstated, given that many contracts must be performed in or near Washington, DC, and shifting the place of performance of existing contracts from one state to another would generally not decrease overall unemployment. Nonetheless, geographic distribution of federal spending and federal funding is often a concern during economic downturns.

This report discusses constitutional and other legal issues related to the creation and implementation of location-based preferences in federal contracting, as well as summarizes key authorities requiring or allowing federal agencies to "favor" contractors located in specific places. The report does not address federal preferences for domestic products or provisions of federal law that could, depending upon their implementation, effectively prefer local contractors, such as project labor agreements.

Keywords
federal government, contracting, location-based preferences, legal issues

Comments

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Congressional Research Service

Location-Based Preferences in Federal and Federally Funded Contracting: An Overview of the Law

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Summary

The recession that began in December 2007 has prompted increased interest among some Members of Congress and their constituents in legal authorities that could require or allow federal agencies to prefer contractors in one state or locality over those in other states or localities. Federal spending on procurement contracts has remained high, totaling $523.9 billion in FY2009, at a time when many other businesses have scaled back their purchases of goods and services. However, this spending has historically been localized in three to five states, which receive nearly half of all federal procurement dollars, prompting concerns about whether other states receive their "fair share."

The federal government generally awards contracts to the lowest qualified responsible offeror, regardless of the offeror's location. However, some provisions of federal law require or allow contracting agencies to favor vendors in certain localities. The main government-wide preferences are for (1) "local contractors" in areas affected by presidentially declared disasters or emergencies; (2) businesses in "labor surplus areas," or areas with particularly high unemployment; and (3) small businesses in Historically Underutilized Business Zones (HUBZones), or census tracks, nonmetropolitan counties, or other areas with low household income or high unemployment. Federal agencies may conduct set-asides for, or grant evaluation preferences to, local contractors; use firms' status as labor surplus area concerns, or willingness to locate facilities in labor surplus areas, as a tie-breaker in sealed bid procurements or an evaluation factor in certain negotiated procurements; and make special sole-source awards to, conduct set-asides for, or grant price evaluation preferences to HUBZone small businesses. Other agency-specific preferences also exist, such as those for "local private, nonprofit, or cooperative entities" under the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (P.L. 111-88).

There generally must be statutory authority for any geographic preference involving federal contracts or federally funded contracts. Such statutory preferences do not themselves deprive vendors outside the targeted area of equal protection in violation of the U.S. Constitution because classifications based on geography are subject to "rational basis review" and need only have a rational relationship to a legitimate government interest. However, absent congressional authorization, attempts by state or local governments to create location-based preferences for federally funded procurement contracts would violate the constitutional prohibition on state or local legislation that burdens or discriminates against interstate commerce. Similar attempts by federal agencies to prefer vendors in certain locations without congressional authorization would violate procurement integrity regulations and the Competition in Contracting Act (CICA) of 1984.

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Introduction

The recession that began in December 2007 has prompted increased interest among some Members of Congress and their constituents in legal authorities that could require or allow federal agencies to prefer contractors in one state or locality over those in other states or localities.[1] Federal spending on procurement contracts has remained high, reaching $523.9 billion in FY2009,[2] at a time when many other businesses have scaled back their purchases of goods and services.[3] However, this spending has historically been localized in three to five states, which receive nearly half of all federal procurement dollars,[4] prompting concerns about whether other states receive their "fair share." Such concerns may be overstated, given that many contracts must be performed in or near Washington, DC,[5] and shifting the place of performance of existing contracts from one state to another would generally not decrease overall unemployment.[6] Nonetheless, geographic distribution of federal spending and federal funding is often a concern during economic downturns.[7]

This report discusses constitutional and other legal issues related to the creation and implementation of location-based preferences in federal contracting, as well as summarizes key authorities requiring or allowing federal agencies to "favor" contractors located in specific places.[8] The report does not address federal preferences for domestic products[9] or provisions of

[1] The National Bureau of Economic Research recently announced that this recession ended in June 2009. *See, e.g.*, Phil Izzo, Recession Over in June 2009, *Wall Street J.*, Sept. 20, 2010, *available at* http://blogs.wsj.com/economics/2010/09/20/nber-recession-ended-in-june-2009/. However, concerns about the distribution of federal contract dollars persist because of weak economic performance and high unemployment in many states.

[2] Federal Spending FY2009, *USASpending.gov*, *available at* http://www.usaspending.gov (last accessed Feb. 16, 2009).

[3] *See, e.g.*, Michael Keating, Government Contracting Remains Recession Proof, *GovPro*, Feb. 2, 2010, *available at* http://govpro.com/federal/government-contractors-revenue-20100202 ("In spite of the private sector's fiscal struggles in 2009, government contractors did fairly well.").

[4] In FY2009, the top five states received 44.76% of federal contract dollars, while the bottom five states received 0.39% of federal contract dollars. *See* Federal Contract Awards by Contractor State, USASpending.gov, *available at* http://www.usaspending.gov/fpds/tables.php?tabtype=t1&rowtype=c&subtype=p&sorttype=2009, accessed on Feb. 17, 2010.

[5] Virginia and Maryland, which are both adjacent to the seat of the federal government, ranked within the top five for federal procurement spending by state in FY2009. Service contracts, which comprise over 50% of all federal contracts, are particularly likely to require vendors located near the agencies they serve.

[6] It may shift unemployment from state to state; for example, if the place of performance of an existing requirement were shifted from State A to State B, workers in State A might lose jobs while workers in State B gained them. Alternatively, when the location of the vendor holding the contract changes but the contract's place of performance does not, the vendor's locale may see only minimal increases in employment. This is, in part, because Executive Order 13495 requires that federal service contracts generally include clauses requiring that contractors and subcontractors succeeding an incumbent contractor offer non-managerial and non-supervisory employees of that contractor the right of first refusal for any positions under the contract for which they are qualified. 74 Fed. Reg. 6103 (Feb. 4, 2009).

[7] *See, e.g.*, H.R. 3684 (seeking "improved nationwide distribution" in small business lending).

[8] In a few instances, provisions of federal law disfavor "local" vendors in competitions for certain contracts awarded outside the United States. In those cases, American contractors are preferred over local contractors. *See, e.g.*, 22 U.S.C. § 4864(c) (promoting the award of local guard contracts for Foreign Service buildings in excess of $250,000 to U.S. contractors).

[9] *See generally* CRS Report 97-765, *The Buy American Act: Requiring Government Procurements to Come from Domestic Sources*, by John R. Luckey.

federal law that could, depending upon their implementation, effectively prefer local contractors, such as project labor agreements.[10]

Constitutional and Other Legal Issues

There generally must be statutory authority for any geographic preferences involving federal contracts or federally funded contracts. Such statutory preferences do not themselves deprive vendors outside the targeted area of equal protection in violation of the U.S. Constitution. However, absent congressional authorization, attempts by state or local governments to create location-based preferences for federally funded procurement contracts would violate the constitutional prohibition on state or local legislation that burdens or discriminates against interstate commerce. Similar attempts by federal agencies to prefer vendors in certain locations without congressional authorization would violate procurement integrity regulations and the Competition in Contracting Act (CICA) of 1984.

Equal Protection

Although the Fifth Amendment assures persons of equal protection under federal law,[11] federal location-based preferences do not unconstitutionally discriminate between persons in different places. Certain classifications, such as those based on race or gender, are suspect and subject to heightened scrutiny when challenged.[12] In the case of classifications that are subject to strict scrutiny, this means that the government must show that programs incorporating these classifications are necessary to meet a compelling government interest.[13] Other classifications, including those based on geography or income, are subject to "rational basis review."[14] Under rational basis review, the party challenging the government program must show that it is not

[10] A project labor agreement (PLA) is a type of collective bargaining agreement commonly used on large private construction projects. "It forms the centerpiece of labor relations by standardizing terms and conditions of employment among multiple contractors; providing a single dispute resolution mechanism; and insulating the project from costly strikes, picketing, and related activities." Robert W. Kopp & John Gaal, The Case for Project Labor Agreements, 19 *Constr. Law.* 5, 5 (1999). President Obama has issued an executive order encouraging federal agencies to use PLAs in federal construction projects valued at $25 million or more. *See* Executive Order 13502, 74 Fed. Reg. 6985 (Feb. 11, 2009).

[11] U.S. Const. amend. V (due process); Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that due process under the Fifth Amendment encompasses equal protection). Equal protection applies to both natural and juridical persons, which include corporations. *See* Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394 (1886).

[12] *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996) (requiring the state to provide an "exceedingly persuasive justification" for its policy of maintaining an all-male military academy); Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (subjecting state laws that classify on the basis of alienage to strict scrutiny); Loving v. Virginia, 388 U.S. 1, 11 (1967) (racial classifications must be shown to be necessary to some "legitimate overriding purpose"); McLaughlin v. Florida, 379 U.S. 184, 192, 194 (1964) (racial classifications "bear a far heavier burden of justification" than other classifications and are invalid absent an "overriding statutory purpose"); Korematsu v. United States, 323 U.S. 214, 216 (1944) (wartime evacuation of Japanese-Americans from the West Coast "immediately suspect" and subject to "rigid scrutiny" because it involved a single ethnic group).

[13] *See, e.g.*, Rothe Dev. Corp. v. Dep't of Defense, 545 F.3d 1023 (Fed. Cir. 2008) (striking down a race-conscious contracting program).

[14] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973) ("[W]ealth discrimination alone [does not provide] an adequate basis for invoking strict scrutiny."); McGowan v. Md., 366 U.S. 420, 427 (1961) (holding that "the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite.")

rationally related to a legitimate government objective by "negativ[ing] every conceivable basis which might support" the program.[15] Rational basis review is thus a very deferential standard of review and "serves to invalidate only 'wholly arbitrary acts.'"[16]

Courts applying rational basis review have, for example, upheld motor vehicle insurance rates based, in part, on the location where vehicles are garaged[17] and "blue laws" applicable only to certain parts of the state.[18] In neither case did alleging flaws in the logic underlying the geographic distinctions suffice because there still remained some relationship between the territorial classification and the government's objective.[19] Such a relationship arguably exists in the case of location-based contracting preferences because, as is discussed below, the government seeks to promote the economic development of certain communities through such preferences.

Commerce Clause

The Commerce Clause of the Constitution grants Congress the power to regulate interstate commerce.[20] It has long been held that this clause is not only a positive grant of power to Congress, but also a negative constraint upon the states.[21] Thus, absent a positive authorization of Congress, the states are constrained from discriminating against interstate commerce.

In the area of state procurement, the Supreme Court has generally looked to the source of funding to see what local preferences are permitted. If the project is locally funded, the Court has allowed local preferences. If federal funding is involved, then local preferences are permitted only if specifically authorized by Congress.

White v. *Massachusetts Council of Construction Employers* illustrates the Court's approach to local preferences in state or local procurements.[22] Here, the mayor of Boston issued an executive order requiring all construction projects funded, in whole or in part, by city funds or funds that the city had authority to administer to be performed by a work force at least half of which were residents of the city. The Court looked to the source of the funding of the projects to determine the impact of the Commerce Clause. When the city expended only its own funds, it was entering the market as a "market participant" and was not subject to the restraints of the Commerce

[15] Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973).

[16] Abdulah v. Comm'n of Insurance, 907 F. Supp. 13 (D. Mass. 1995) (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303-304 (1976).

[17] *Id.* at 10-15.

[18] McGowan v. Md., 366 U.S. at 427.

[19] For example, in upholding the territorially based insurance rates, the court noted, "[P]laintiffs point out the fact that a territory's claims index is computed based on the frequency of all accidents and thefts involving vehicles garaged in that territory, even if those accidents or thefts occur outside the territory. But this observation begs the only relevant inquiry: whether there exists some rational relationship between the territorial rating classifications and the cost of providing insurance for vehicles within each classification."). Abdulah, 907 F. Supp. at 17.

[20] U.S. Const. art.1, § 8, cl. 3.

[21] *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). *See generally* Congressional Research Service, *The Constitution of the United States of America, Analysis and Interpretation* 221-231 (2002) and the cases cited therein.

[22] 460 U.S. 204 (1983).

Clause.[23] In contrast, when federal funds were involved, the Commerce Clause required that any local preference be specifically authorized by Congress.[24]

Procurement Integrity and Competition Requirements

Agency attempts to favor local vendors without specific statutory authority would violate both procurement integrity regulations and the Competition in Contracting Act (CICA) of 1984. Subpart 3.1 of the Federal Acquisition Regulation (FAR), promulgated under the authority of the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949, requires that

> Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none.[25]

Because favoring vendors in specific places would constitute preferential treatment and would not be completely impartial, doing so is not permissible under this regulation *unless* authorized by law.

Additionally, CICA generally requires that contracts be awarded through "full and open competition" unless (1) a small business set-aside is used; (2) one of seven circumstances exist that permit other than full and open competition (e.g., single source, urgent and compelling need); (3) the simplified procedures for "small purchases" ($150,000 or less) are used; or (4) "otherwise expressly authorized by statute."[26] Absent specific statutory authority, location-based preferences would violate this provision of CICA because they are inconsistent with full and open competition and do not involve small business set-asides, circumstances when noncompetitive procedures are permissible, or "small purchases." CICA does, however, provide explicit statutory authority for agencies to define their requirements based upon their needs.[27] Thus, if there were a situation when agency needs were such that a "local" contractor was required, the agency could generally draft the solicitation so as to select an appropriate contractor because CICA provides them with explicit statutory authority to do so.[28]

Absent statutory authority, agencies can only seek to increase the number of contractors in specific places (e.g., those who are "local" for purposes of the work being performed) awarded federal contracts by advertising, outreach, or other means that do not give them preference in the award of a contract. The *Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009*, for example, calls for agencies to

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[23] *Id.* at 206-208 (citing *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976)).

[24] *Id.* at 212.

[25] 48 C.F.R. § 3.101-1.

[26] 10 U.S.C. § 2304(a)(1) (procurements of defense agencies); 41 U.S.C. § 253(a)(1) (procurements of civilian agencies).

[27] 10 U.S.C. § 2305(a)(1)(A)(iii) (procurements of defense agencies) (agencies to "develop specifications in such a manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired"); 41 U.S.C. § 253a(a)(1)(C) (procurements of civilian agencies) (same).

[28] *See, e.g.*, Metcom, Inc., B-153450 (May 6, 1964) (finding that a requirements contract limited to a particular geographical area is no impediment to the issuance of a new invitation for bids for the same items to be supplied to a different area).

> … maximize the economic benefits of a Recovery Act-funded investment in a particular community by supporting projects that seek to ensure that the people who live in the local community get the job opportunities that accompany the investment.[29]

Existing Geographical Preferences

The federal government generally awards contracts to the lowest qualified responsible offeror, regardless of the offeror's location.[30] However, some provisions of federal law require or allow federal agencies to favor contractors located in particular places. There are three main government-wide geographic preferences for (1) "local contractors" under the Stafford Act; (2) businesses in labor surplus areas under the Small Business Act of 1958, as amended, and other authorities; and (3) small businesses in Historically Underutilized Business Zones (HUBZones) under the HUBZone Act of 1997. Other geographic preferences also exist, but are generally agency-specific (e.g., the preference for "local private, nonprofit, or cooperative entities" under the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (P.L. 111-88)).

"Local Contractors" Under the Stafford Act

The preference currently given to "organizations, firms, and individuals residing or doing business primarily in the area affected by [a] major disaster or emergency"[31] originated with the Disaster Relief Act of 1970.[32] Enacted in response to a series of disasters in the 1960s that required significant federal response and recovery operations, including Hurricane Carla in 1962, the Alaskan earthquake in 1964, Hurricane Betsy in 1965, and Hurricane Camille in 1969,[33] the act required, among other things, that

> [i]n the expenditure of Federal funds for debris clearance, distribution of supplies, reconstruction, and other major disaster assistance activities which may be carried out by contract with private organizations, firms, or individuals, preference shall be given, to the extent feasible and practicable, to those organizations, firms, and individuals who reside or do business primarily in the disaster area.[34]

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[29] Executive Office of the President, Office of Management and Budget, Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009, Apr. 3, 2009, *available at* http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-15.pdf.

[30] Responsibility is an attribute of the offeror, while price and qualifications are attributes of the offer.

[31] 42 U.S.C. § 5150(a)(1). For purposes of the Stafford Act, a "major disaster" is "any natural catastrophe … which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance," while an "emergency" is "any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States." 42 U.S.C. § 5122(1)-(2).

[32] P.L. 91-606, 84 Stat. 1744 (Dec. 31, 1970).

[33] *See, e.g.*, Jillian L. Morrison, Post-Disaster Contracting: An Examination of the Costs Associated with the Stafford Act's Local Contracting Preference and Implementation Proposals to Maximize Community Revitalization, 37 *Pub. Cont. L.J.* 687, 697 n.56 (2008).

[34] P.L. 91-606, at § 204, 84 Stat. 1748 (codified, as amended, at 42 U.S.C. § 5150(a)(1)).

Congress hoped this preference would "revitalize" disaster- and emergency-stricken communities "by infusions of cash through the use of local people and business firms,"[35] and it was one of the few provisions carried over when Congress repealed the Disaster Relief Act and replaced it with the Robert T. Stafford Disaster Relief Act in 1974.[36] This section of the Stafford Act is almost identical to its counterpart in the Disaster Relief Act.[37] It differs only in that it adds "or agreement" after "contract," and it changes the ending slightly to read "residing or doing business primarily in the area affected by such major disaster."

Subsequent amendments to the Stafford Act strengthened the preference for "local contractors" by (1) ensuring that they are preferred in emergencies, as well as major disasters;[38] (2) explicitly authorizing agencies to set aside contracts for contractors located in "specific geographic areas";[39] and (3) requiring agencies to justify in writing any expenditures of emergency assistance funds with nonlocal contractors and transition response, relief, and reconstruction work to local firms.[40] Additionally, regulations have been promulgated that limit the degree to which local contractors can subcontract with nonlocal firms.[41] Minimizing subcontracting with nonlocal firms was of particular concern for some Members of Congress because extensive use of nonlocal subcontractors can dilute the economic benefits that local firms and their communities receive from federal disaster and emergency operations.[42]

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[35] S. Rep. No. 91-1157, at 12 (1970).

[36] P.L. 93-288, § 310, 88 Stat. 150. The Stafford Act repealed all sections of the 1970 act except for sections 231, 233, 234, 235, 236, 237, 301, 302, 303, and 304. *See* P.L. 93-288, § 603, 99 Stat. 164 (May 22, 1974).

[37] Section 310 was renumbered Section 307 in 1988. *See* Disaster and Emergency Assistance Amendments of 1988, P.L. 100-707, § 105(e), 102 Stat. 4691 (Nov. 23, 1988).

[38] P.L. 100-707, § 105(e)(2), 102 Stat. 4691 ("Such section is amended by inserting 'or emergency' after 'major disaster' each place it appears.").

[39] Local Community Recovery Act of 2006, P.L. 109-218, § 2, 120 Stat. 333 (Apr. 20, 2006) (codified at 42 U.S.C. § 5150(a)(3)). Sections 2 and 3 this act respond directly to a decision by the Government Accountability Office (GAO) that upheld an agency's determination to set aside a procurement for contractors located in one state. The disaster had affected multiple states, and the protester alleged that the agency violated the Stafford Act by excluding contractors in other states from the set-aside. *See* AshBritt Inc., B-297889, B-297889.2 (Mar. 20, 2006); *infra* notes 52-56 and accompanying text.

[40] Post-Katrina Emergency Management Reform Act of 2006, P.L. 109-295, § 694, 120 Stat. 1459-60 (codified at 42 U.S.C. § 5150(b)(1)-(2)). Agencies may avoid such transition only if the head of the agency determines that it is not feasible or practicable to do so. However, the act also provides that "[n]othing in this section shall be construed to require any Federal agency to breach or renegotiate any contract in effect before the occurrence of a major disaster or emergency."). *Id.* at § 694(c). The act does not specify the timeframe within which the transition is to occur, but acquisitions regulations promulgated under its authority specify that the transition should occur "at the earliest practical opportunity" given (1) the potential duration of the disaster or emergency; (2) the severity of the disaster or emergency; (3) the scope and structure of the existing contract; (4) the potential impact of a transition, including safety, national defense, and mobilization; and (5) the expected availability of qualified local offerors who can provide the products or services at a reasonable price. 48 C.F.R. § 26.603(c)(1)-(5).

[41] Dep't of Defense, General Servs. Admin. & Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation: FAR Case 2006-014, Local Community Recovery Act of 2006, 71 Fed. Reg. 44546, 44548-49 (Aug. 4, 2006) (codified at 48 C.F.R. § 52.226-5) (requiring the local contractor to perform with its own personnel at least 50% of the personnel costs of service contracts; at least 50% of the costs of manufacturing or supply contracts; at least 15% of the costs of the contract (excluding materials) in general construction contracts; and 25% of the costs of the contract (excluding materials) in contracts for special-trade construction). There are also statutory limitations on subcontracting that apply to certain contracts of the Department of Homeland Security. P.L. 109-295, § 692, 120 Stat. 1458 (codified at 6 U.S.C. § 792(b)-(c)) (generally requiring the local contractor to perform 65% of the costs of cost-reimbursement type contracts or task or delivery orders in excess of $150,000).

[42] *See, e.g.*, *Waste and Fraud in the Aftermath of Hurricane Katrina: Hearing of the Subcommittee on Investigations of the Committee on Homeland Security, House of Representatives, 109th Cong., 2d Sess.* 5 (2007) (statement of (continued...)

The Stafford Act itself does not define what it means for vendors to "resid[e] or do[] business primarily" in an area affected by a presidentially declared disaster or emergency. However, acquisition regulations promulgated under the authority of the act specify that, at least for purposes of Stafford Act set-asides, a vendor is local if, during the last 12 months, it had its main operating office in the disaster or emergency area and that office generated at least half of its gross revenue and employed at least half of its permanent employees.[43] Vendors that are not "local" under these criteria could still qualify as "local" under other criteria, which include

> [p]hysical location(s) of the offeror's permanent office(s) and date any office in the set-aside area(s) was established; … [c]urrent state licenses; … [r]ecord of past work in the set-aside area(s) (e.g., how much and for how long); … [c]ontractual history the offeror has had with subcontractors and/or suppliers in the set-aside area;… [p]ercentage of the offeror's gross revenues attributable to work performed in the set-aside area; … [n]umber of permanent employees the offeror employs in the set-aside area; … [m]embership in local and state organizations in the set-aside area; and … [o]ther evidence that establishes the offeror resides or primarily does business in the set-aside area.[44]

Decisions by the Government Accountability Office (GAO) in bid protests involving procurements conducted under the authority of the Stafford Act have further construed these regulations to mean that (1) agencies can consider firms' place of incorporation and the location of their corporate headquarters in determining where they "reside"[45] and (2) agencies determining where firms "primarily do business" must consider where these firms do the majority of their business, not where they do the predominant or largest single amount of their business.[46] However, some commentators have suggested that "loopholes" in the regulations could, at times, defeat the purposes of the Stafford Act by allowing awards to firms that have minimal percentages of local ownership or relocate from the local area during the period of contract performance.[47]

The Stafford Act, as originally enacted, also did not specify what form the "preference" for local contractors should take,[48] which meant that agencies generally had "broad discretion" to craft an appropriate preference in their regulations or in individual solicitations.[49] However, agencies

(...continued)

Representative Bennie G. Thompson) (discussing how multiple layers of subcontracts can diminish the value of federal funding received by local individuals and companies).

[43] 48 C.F.R. § 52.226-3(c)(1)-(2). There are no regulations explicitly addressing what it means for a firm to reside or do business in a disaster or emergency area for purposes of evaluation preferences.

[44] 48 C.F.R. § 52.226-3(d)(1)-(8).

[45] AlliedBarton Security Services LLC, B-299978, B-299978.3, B-299978.4 (Oct. 9, 2007) (finding that the Federal Emergency Management Agency reasonably considered the offeror's place of incorporation and the location of its corporate headquarters in determining that the contractor did not reside in Louisiana for purposes of a procurement set-aside for Louisiana vendors).

[46] Executive Protective Security Service, Inc., B-299954.3 (Oct. 22, 2007) (finding that the Federal Emergency Management Agency's determination that a firm that received 24% of its gross revenue and had less than 16% of its total workforce in Mississippi was local for purposes of contract set aside for Mississippi firms was unreasonable).

[47] *See* Post-Disaster Contracting, *supra* note 33, at 723. Once it obtains a contract based on its "local" status, a firm could relocate outside the disaster or emergency area. In contrast, a firm that receives a contract based on its status as a HUBZone small business must remain in a HUBZone throughout the period of contract performance.

[48] *Cf.* HAP Construction, Inc., B-280044.2 (Sept. 21, 1998) ("[T]he statute does not specify the extent of the preference.").

[49] *See, e.g., id.* ("Where a statute requires that a preference be given to a class of potential contractors, but does not specify a particular evaluation formula, agency acquisition officials have broad discretion in selecting evaluation (continued...)

devised two forms of preferences—(1) set-asides for contractors in specific geographic areas and (2) evaluation preferences, or consideration of whether a firm is local as a factor in the award of contracts—that GAO upheld as reasonable interpretations of the Stafford Act. First, in *HAP Construction, Inc.*, GAO found that an agency sufficiently preferred local vendors when it considered the location of the offeror's primary place of business and the extent of subcontracting with local firms as "significant technical factors" in determining to whom to make an award.[50] GAO specifically rejected the disappointed offeror's assertion that any such factors must be part of an "evaluation scheme [where locality is on a virtual par with price] which will produce award to a local contractor, unless all bids from local contractors are so highly priced as to not be feasible for award."[51] Then, in *AshBritt Inc.*, GAO rejected a disappointed offeror's allegation that the agency violated the Stafford Act by setting aside a procurement for vendors located in a particular state when multiple states had been affected by the same presidentially declared disaster.[52] After the *AshBritt* decision, Congress enacted legislation that amended the Stafford Act to explicitly authorize the set-asides for "specific geographic area[s]" that GAO approved of in *AshBritt*.[53] Regulations promulgated under the authority of this legislation also recognized agencies' use of evaluation factors as a means of preferring local contractors.[54] Currently, these regulations authorize agencies to use local area set-asides or evaluation preferences and to define the geographic area of any set-aside as they see fit so long as it does not include counties not within the disaster or emergency area.[55] The current regulations also permit agencies to further restrict set-asides to small business concerns within the defined geographic area.[56]

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factors that should apply to an acquisition to effectuate the statutory mandate, and the relative importance of those factors.") (quoting US Defense Sys., Inc., B-251544; B-251938; B-251940 (Mar. 30, 1993) (finding that the agency did not violate a statutory requirement to give U.S. contractors preference in the award of "local guard contracts" under 22 U.S.C. § 4864 when it changed the weight given to technical proficiency relative to price in evaluating offers)).

[50] *Id.*

[51] *Id.*

[52] B-297889; B-297889.2 (Mar. 20, 2006).

[53] P.L. 109-218, § 2, 120 Stat. 333 (Apr. 20, 2006) (codified at 42 U.S.C. § 5150(a)(3)).

[54] *See* Dep't of Defense, General Servs. Admin., & Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation; FAR Case 2006-014, Local Community Recovery Act of 2006, 71 Fed. Reg. 44546, 44548 (Aug. 4, 2006); 48 C.F.R. § 26.202(b) (2007) ("The contracting officer may use other appropriate procedures to give preference to those organizations, firms, or individuals residing or doing business primarily in the area affected by the major disaster or emergency to the extent feasible and practicable. For example, the contracting officer may implement the preference by using an evaluation factor."). The provision presently in the FAR is slightly different. *See infra* note 55.

[55] 48 C.F.R. § 26.202 ("Preference may be given through a local area set-aside or an evaluation preference."); 48 C.F.R. § 26.202-1(b) ("A major disaster or emergency area may span counties in several contiguous States. The set-aside area need not include all the counties in the declared disaster/emergency area(s), but cannot go outside it.").

[56] 48 C.F.R. § 26.202-1(c). Some agencies have had additional preferences for local contractors beyond those described above. For example, until 2006, the Federal Emergency Management Agency included a clause in its solicitations that permitted local contractors to "match" the lowest-priced or best-value bid or offer received from otherwise eligible non-local offerors:

> The lowest priced local offeror within 130 percent of the lowest non-local offeror shall have the first chance to meet the non-local price. If the local offeror meets the lowest non-local price and is determined to be responsible, award shall be made. If the non-local offer is not met, the next lowest local offeror within 130 percent shall have the chance to meet the lowest non-local price. This process shall continue until award is made to a local offeror within the 130 percent requirement or the supply of local offerors is exhausted and award made to the lowest non-local offeror.

48 C.F.R. § 4452.217-70 (2006). No such agency-specific preferences appear to be in effect at the present time, however.

Sole-source awards for disaster- and emergency-related contracts have recently been of concern to some Members of Congress and the public, in part because of allegations that agencies may have effectively limited opportunities for local vendors, particularly small businesses, by making sole-source awards to large nonlocal vendors.[57] Such awards are not made under the authority of the Stafford Act, however. They are made under the authority of the Competition in Contracting Act (CICA) of 1984, which permits agencies to make sole-source awards in certain circumstances, including when there is "unusual and compelling urgency."[58]

Labor Surplus Area Concerns Under the Small Business Act and Other Authorities

Vendors located in labor surplus areas, or "civil jurisdictions"[59] with unemployment rates that are 120% of the national average or 10% or higher,[60] are also given certain preferences in federal contracting. However, while still based in statute, the preferences that such vendors presently receive are minimal compared to those they formerly received.

Currently, Section 15 of the Small Business Act, as amended, requires that federal agencies give "priority" to small businesses that "perform a substantial proportion of the production … within areas of concentrated unemployment or underemployment or within labor surplus areas" when setting aside contracts for small businesses.[61] The act does not indicate what form this "priority" should take,[62] but regulations promulgated under its authority direct agencies to use small

[57] In 2006, Congress imposed limitations on the length of certain noncompetitive contracts awarded by the Department of Homeland Security to "facilitate response to or recovery from a natural disaster, act of terrorism, or other man-made disaster." Such contracts cannot exceed 150 days unless the Secretary of Homeland Security determines that exceptional circumstances apply. P.L. 109-295, § 695, 120 Stat. 1460 (Oct. 4, 2006).

[58] 10 U.S.C. § 2304(c)(1)-(7) (procurements of defense agencies) & 41 U.S.C. § 253(c)(1)-(7) (procurements of civilian agencies). For more on CICA, see CRS Report R40516, *Competition in Federal Contracting: An Overview of the Legal Requirements*, by Kate M. Manuel. An amendment made to CICA by Section 862 of the Duncan Hunter National Defense Authorization Act for FY2009 imposed similar limitations on the duration of contracts awarded by any agency in reliance on the exception for unusual and compelling urgency. The term of such contracts may not exceed the time necessary (1) to meet the unusual and compelling requirements of the work to be performed under the contract and (2) for the executive agency to enter into another contract for the required goods and services through the use of competitive procedures. Such contracts may not last longer than one year unless the head of the agency entering into the contract determines that exceptional circumstances apply. P.L. 110-417, § 862, 122 Stat. 4546 (Oct. 14, 2008).

[59] Civil jurisdictions include (1) cities with 25,000 or more people, as measured by the most recent available Bureau of the Census estimates; (2) towns and townships in the states of New Jersey, New York, Michigan, and Pennsylvania with 25,000 or more people which possess powers and functions similar to cities; (3) counties except those containing cities, towns, or townships with 25,000 or more people; (4) all other counties, with any component cities, towns, or townships excluded; or (5) county equivalents that are towns in the states of Massachusetts, Rhode Island and Connecticut. 20 C.F.R. § 654.4(b)(1)-(5).

[60] No civil jurisdiction may be classified as a labor surplus area if its average unemployment rate is less than 6%. 20 C.F.R. § 654.5(a).

[61] 15 U.S.C. § 644(d).

[62] Although the current text of Section 644(d) of Title 15 of the United States Code still refers to set-asides for labor surplus area concerns, no such set-asides appear to have been implemented since 1993, and regulations promulgated under the authority of the Federal Acquisition Streamlining Act (FASA) of 1994, discussed below, construed FASA as eliminating the labor surplus area set-aside program. *Compare* 15 U.S.C. § 644(d) ("Notwithstanding any other provision of law, total labor surplus area set-asides pursuant to Defense Manpower Policy Number 4 (32A C.F.R. Chapter 1) or any successor policy shall be authorized if the Secretary or his designee specifically determines that there is a reasonable expectation that offers will be obtained from a sufficient number of eligible concerns so that awards will be made at reasonable prices. As soon as practicable and to the extent possible, in determining labor surplus areas, (continued...)

businesses' status as "labor surplus area concerns"[63] as a tie-breaker in the event of equal low bids in procurements conducted by sealed bidding:

> Contracts shall be awarded in the following order of priority when two or more low bids are equal in all respects: (1) [s]mall business concerns that are also labor surplus area concerns[;] (2) [o]ther small business concerns; and (3) [o]ther business concerns.[64]

These regulations also allow agencies to include "establishment of new facilities in or near labor surplus areas" as a factor when evaluating the make-or-buy programs of prospective contractors *of any size* in certain negotiated procurements.[65] Executive Order 10582 further provides that, although agencies may purchase materials of foreign origin for public use within the United States under the Buy American Act when the price of materials of domestic origin is unreasonable or the purchase of such materials is inconsistent with the public interest, they may nonetheless

> … reject a bid or offer to furnish materials of foreign origin in any situation in which the domestic supplier offering the lowest price for furnishing the desired materials undertakes to produce substantially all of such materials in [an] area of substantial unemployment.[66]

Although labor surplus areas are not explicitly mentioned here, "area of substantial unemployment" is generally taken to mean a labor surplus area.[67] Various forms of non-

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consideration shall be given to those persons who would be available for employment were suitable employment available.") *with* General Servs. Admin., Nat'l Aeronautics & Space Admin., & Dep't of Defense, FAR Case 94-780: Federal Acquisition Regulation, Small Business, 60 Fed. Reg. 48258 (Sept. 18, 1995) ("elimination of the Labor Surplus Area (LSA) set-aside program").

[63] As used here, "labor surplus area concerns" are "concern[s] that together with [their] first-tier subcontractors … perform substantially in labor surplus areas." 48 C.F.R. § 2.101.

[64] 48 C.F.R. § 14.408-6(a)(1)-(3). *See also* 48 C.F.R. § 19.202-3 ("In the event of equal low bids …, awards shall be made first to small business concerns which are also labor surplus area concerns, and second to small business concerns which are not also labor surplus area concerns."). This preference appears to apply only to manufacturing or production contracts, but the output of first-tier subcontractors, as well as that of the prime contractor, is included when determining whether at least 50% of the contract price is performed in a labor surplus area. *See, e.g.*, 48 C.F.R. § 52.212-3 (representations and certifications regarding commercial items, including identification of any labor surplus areas in which the costs to be incurred on account of manufacturing or production by the offeror or first-tier subcontractors exceed 50% of the contract price); 48 C.F.R. § 52.219-2(b)-(c) ("The bidder's status as a labor surplus area (LSA) concern may affect entitlement to award in case of tie bids. If the bidder wishes to be considered for this priority, the bidder must identify … the LSA in which the costs to be incurred on account of manufacturing or production (by the bidder or the first-tier subcontractors) amount to more than 50 percent of the contract price. … Failure to identify the labor surplus areas as specified in paragraph (b) of this provision will preclude the bidder from receiving priority consideration. If the bidder is awarded a contract as a result of receiving priority consideration under this provision and would not have otherwise received award, the bidder shall perform the contract or cause the contract to be performed in accordance with the obligations of an LSA concern.").

[65] 48 C.F.R. § 15.407-2(d)(2) & (e)(2)(v). A make-or-buy program is "that part of a contractor's written plan for a contract identifying those major items to be produced or work efforts to be performed in the prime contractor's facilities and those to be subcontracted." 48 C.F.R. § 2.101. This provision generally applies to negotiated procurements requiring cost or pricing data whose estimated value is $12.5 million or more, except when the proposed contract is for research or development and, if prototypes or hardware are involved, no significant follow-on production is anticipated. 48 C.F.R. § 15.407-2(c)(1)-(2). However, it can apply to negotiated procurements whose estimated value is under $12.5 million if the contracting officer determines that the information is necessary and documents the reasons in the contract file. *Id. See* 48 C.F.R. § 42.302(a)(55) (providing that contract administration functions include periodic surveillance to "ensure the contractor's compliance with … any labor surplus area contractual requirements").

[66] Prescribing Uniform Procedures for Certain Determinations under the Buy-American Act, 19 Fed. Reg. 8723 (Dec. 21, 1954). Bids or offers whose price is "excessive" may still be rejected notwithstanding this provision.

contractual assistance are also provided to labor surplus areas by federal agencies and state and local governments, but these are outside the scope of this report.[68]

Previously, there were additional preferences for vendors of any size located in labor surplus areas, including price preferences, set-asides, and subcontracting programs. These preferences originated in 1952 with President Truman's Defense Manpower Policy No. 4 (DMP-4), which authorized agencies to award contracts to vendors in "surplus labor areas" even when they were not the lowest-priced bidders so long as their prices were "reasonable" and did not exceed ceiling prices set by the Office of Price Stabilization.[69] Agencies implemented DMP-4, in part, by set-asides for labor surplus area concerns and subcontracting programs that required agency prime contractors to subcontract with such concerns.[70] Congress merged the set-asides for labor surplus areas with those for small businesses in 1977 when it amended the Small Business Act of 1958 to authorize agencies to use "total labor surplus area set-asides" whenever the Secretary of Labor or a designee "specifically determines that there is a reasonable expectation that offers will be obtained from a sufficient number of eligible concerns so that awards will be made at reasonable prices."[71] In addition to creating a statutory basis for agencies' existing practices, Congress created a hierarchy of various types of set-asides for various sized firms.[72] Under this hierarchy, agencies were to use total set-asides for small businesses located in labor surplus areas if possible.[73] If that was not possible, they were to use total set-asides for small businesses, followed by partial set-asides for small businesses and then total set-asides for labor surplus area concerns.[74] Unlike a total set-aside, a partial set-aside is a procurement for only part of which competition is restricted; for the other part, any size or type firm can compete. One year later, in

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[67] *See* U.S. Department of Labor, Employment and Training Administration, Labor Surplus Area (LSA) List for Program Year (PY) 2009 (Dec. 2, 2008), *available at* http://wdr.doleta.gov/directives/attach/ten/ten2008/ten21-08.pdf (characterizing Executive Order 10582 as one pertaining to labor surplus area concerns).

[68] *See id.*

[69] Office of Defense Mobilization, Placement of Procurement in Areas of Current or Imminent Labor Surplus, 17 Fed. Reg. 1195 (Feb. 7, 1952). DMP-4 was issued as part of broader efforts to ensure that conversion from civilian to military production did not "result in dislocations causing serious waste of manpower and facilities in many areas, and thereby reducing our defense potential." *Id*.

[70] *See, e.g.*, Gov't Accounting Office, *The Labor Surplus Policy: Is It Effective in Providing Government Contracts to High Unemployment Areas and Jobs to the Disadvantaged?* (July 15, 1977), *available at* http://archive.gao.gov/f1002a/102959.pdf; John Cibinic Jr. & Ralph Nash Jr., *Formation of Government Contracts* 628-31 (1st ed. 1982). The subcontracting program required that government contracts valued above a certain amount include a clause stating that it is government policy to contract with labor surplus area concerns and obligating the contractor to use its "best efforts" to award subcontracts to such concerns. For contracts with higher values, contractors had to agree to develop their own subcontracting "programs" for labor surplus area concerns.

[71] An Act to Amend the Small Business Act and the Small Business Investment Act of 1958 to Increase Loan Authorization and Surety Bond Guarantee Authority, P.L. 95-89, § 502, 91 Stat. 562-63 (Aug. 4, 1977).

[72] *Id.*

[73] *Id.*

[74] *Id.* Congress amended these provisions in 1980 to ensure that small business set-asides took precedence over those for labor surplus area concerns that were not small businesses. *See* An Act to Provide Authorization for the Small Business Administration, and for Other Purposes, P.L. 96-302, § 117, 94 Stat. 839-40 (July 2, 1980) (establishing that total set-asides for small businesses located in labor surplus areas have priority, followed by total set-asides for small businesses, then partial set-asides for small businesses located in labor surplus areas, and then partial set-asides for small businesses). Only after priority was given to these categories of small businesses were agencies to implement total set-asides for concerns that were not small but would "perform a substantial proportion of the production on those contracts and subcontracts within areas of concentrated unemployment or underemployment or within labor surplus areas.").

1978, President Carter issued Executive Order 12073, directing agencies to "emphasize procurement set-asides in labor surplus areas in order to strengthen our Nation's economy."[75] The order required that agencies set targets for contracting with labor surplus area concerns and use set-asides or "other appropriate methods" to meet these targets.[76]

The Federal Acquisition Streamlining Act (FASA) of 1994 effectively ended most of these preferences for labor surplus area concerns by repealing those sections of the Small Business Act that established the order of preference for total and partial set-asides.[77] Even prior to FASA, however, implementation of set-asides for labor surplus area concerns, in particular, had been limited by the Maybank Amendment. First introduced by Senator Burnet R. Maybank as an appropriations rider to the Department of Defense (DOD) appropriations act for FY1954, the Maybank Amendment prohibited DOD from paying "price differential[s] for the purpose of relieving economic dislocations."[78] Similar provisions were included in subsequent DOD appropriations acts, forcing DOD to develop a system of partial set-asides in order to comply with the dual mandates of DMP-4 and the Maybank Amendment. DOD would split the procurement into two parts, one of which was open to unrestricted bidding. Labor surplus area concerns then had to match the benchmark price established through the unrestricted bidding to be awarded the set-aside portion of the contract. Because labor surplus area concerns had to meet competitively established prices, DOD could assert that it paid no "price differentials" with this approach.[79]

Even after Congress amended the Small Business Act in 1977 to authorize total set-asides for labor surplus areas, DOD was still precluded from implementing them because Congress reenacted the Maybank Amendment after enacting the 1977 amendments. When confronted with the question of which governed, the 1977 amendments authorizing total set-asides or the re-enacted Maybank Amendment prohibiting DOD from paying "price differential[s] for the purpose of relieving economic dislocations," GAO recommended that the provisions of the Maybank Amendment prevailed because they were the last enacted,[80] and the executive branch complied with GAO's recommendations.[81] The Maybank Amendment was made permanent and codified at 10 U.S.C. § 2392(b) in 1981.[82] It remains in effect even though FASA repealed almost all provisions of the Small Business Act regarding labor surplus area set-asides, but it does not bar DOD from implementing set-asides for HUBZone small businesses, discussed below.[83]

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[75] Federal Procurement in Labor Surplus Areas, 43 Fed. Reg. 36873, 36873 (Aug. 16, 1978).

[76] *Id.*

[77] P.L. 103-355, § 7101, 108 Stat. 3367 (Oct. 13, 1994). *See also* FAR Case 94-780, *supra* note 62.

[78] An Act Making Appropriations for the Department of Defense and Related Independent Agencies for the Fiscal Year Ending June 30, 1954 and for Other Purposes, P.L. 83-179, § 644, 67 Stat. 357 (Aug. 1, 1953).

[79] *See, e.g.*, *An Assessment of the Labor Surplus Area Procurement Preference Program*, vol. 1, pt. 1, pg. 23 (1979).

[80] Maybank Amendment, B-145136 (Oct. 31, 1977) ("[W]e feel compelled to conclude that the Maybank Amendment as contained in section 823 of P.L. 95-111 and viewed in its historical context must prevail as the later expression of Congress.").

[81] Because the "separation of powers" doctrine precludes legislative branch agencies, such as GAO, from controlling the actions of executive branch agencies, the recommendations that GAO makes in appropriations or bid protest decisions are not legally binding upon executive branch agencies. *See* Ameron, Inc. v. U.S. Army Corps of Eng's, 809 F.2d 979, 986 (3d Cir. 1986).

[82] Department of Defense Authorization Act, 1982, P.L. 97-86, § 913(a)(1), 95 Stat. 1123 (Dec. 1, 1981).

[83] The HUBZone program arguably does not target "economic dislocations" in the same way that labor surplus area set-asides did because it was not intended to respond to economic changes brought about by conversion from civilian to defense production, as labor surplus area set-asides were. Additionally, even if the HUBZone program were seen as targeting "economic dislocations," it would prevail over the codified Maybank Amendment because it was enacted (continued...)

HUBZone Small Businesses Under the HUBZone Act

Small businesses located in Historically Underutilized Business zones (HUBZones) also receive preferences in federal contracting. These preferences originated with the HUBZone Act of 1997, as Title VI of the Small Business Reauthorization Act of 1997 is commonly known,[84] an act characterized by its sponsors as both a jobs bill and a welfare-to-work bill.[85] In enacting the HUBZone Act, Congress hoped that federal spending in "economically stagnant areas" would enable local businesses to build their capacity and would have a "multiplier effect," as money was re-spent within the community.[86] Some commentators have characterized the HUBZone program as a replacement for labor surplus area set-asides,[87] while others have described it as an attempt to assist socially and economically disadvantaged individuals outside the context of the 8(a) Minority Business Development Program.[88] Two years prior to enactment of the HUBZone Act, the Supreme Court applied strict scrutiny to a federal minority contracting program for the first time,[89] prompting concerns about the future of the 8(a) Program given the presumption that certain racial and ethnic minorities are disadvantaged incorporated in the Small Business Act.[90]

A HUBZone is any area located within one or more of the following:

1. ***qualified census tracts***: any census tract designated by the Secretary of Housing and Urban Development (1) in which 50% or more of the households have an

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later.

[84] P.L. 105-135, §§ 601-607, 111 Stat. 2627-36 (Dec. 2, 1997). Shortly prior to enactment of the HUBZone Act, then-President Clinton issued an Executive Order proposing a new program of "empowerment contracting," under which agencies could "grant qualified large businesses and qualified small businesses appropriate incentives to encourage business activity in areas of general economic distress, including a price or an evaluation credit, when assessing offers for government contracts in unrestricted competitions." Executive Order 13005, 61 Fed. Reg. 26069, 26069 (May 24, 2006). Under the Order, an "area of general economic distress" included any census tract with a poverty rate of at least 20%; any designated Federal Empowerment Zone, Supplemental Empowerment Zone, Enhanced Enterprise Community, or Enterprise Community; or any rural or Indian Reservation area designated by the Secretary of Labor based upon its unemployment rate, degree of poverty, extent of outmigration, and rate of business formation and growth. *Id*. at 26070. Executive Order 13005 remains in effect, but there are no regulations implementing it. Some agencies issued proposed rules under the Order, but none were ever finalized. *See, e.g.*, Dep't of Commerce, Empowerment Contracting, 62 Fed. Reg. 27556 (May 20, 1997) (further recognizing "areas of severe economic distress.").

[85] *The HUBZone Act of 1997: Hearing on S. 208 Before the Senate Comm. on Small Bus., 105th Cong.* 1 (1997) (statement of Senator Christopher Bond, Chairman, Senate Committee on Small Business) ("[T]he HUBZone Act directs specific Federal Government help to inner cities and rural counties that have low household incomes, high unemployment, and whose communities have suffered from a lack of investment.").

[86] Small Bus. Admin., *HUBZone Report to Congress* 6, 27 (2002).

[87] *See, e.g.*, Deirdre Roney, HUBZones: The Class-Based Idea, 32 *Pub. Cont. L. J.* 933, 933 (2003) ("This program constitutes a new form of an older idea, which first appeared in federal regulations as the 'Labor Surplus Area' concept.").

[88] The term "historically underutilized business" reportedly originated in 1992 as a synonym for "disadvantaged business." *See* Roney, *supra* note 87, at 940; Kendall L. Miller, HUBZones: Moving from the Racial Battleground to the Economic Common Ground, 3 *J. of Small & Emerging Bus. L.* 367, 376 (1999) ("In light of the mentioned failures of the 8(a) business development program, several members of Congress originally proposed that the HUBZone program occupy a higher priority than the 8(a) program.").

[89] Adarand Constructors Inc. v. Peña, 515 U.S. 200 (1995). *See generally* CRS Report RL33284, *Minority Contracting and Affirmative Action for Disadvantaged Small Businesses: Legal Issues*, by Jody Feder.

[90] *See* 15 U.S.C. § 631(f)(1)(C). Such presumptions have been found to constitute "explicit racial classification[s]." Rothe Dev. Corp. v. Dep't of Defense, 545 F.3d 1023, 1035 (Fed. Cir. 2008).

income which is less than 60% of the area median gross income or (2) which has a poverty rate of at least 25%.[91]

2. ***qualified nonmetropolitan counties***, or any counties that were not located in a metropolitan statistical area at the time of the most recent census in which the (A) the median household income is less than 80% of the nonmetropolitan state median household income, based on the most recent data available from the Bureau of the Census; (B) the unemployment rate is not less than 140% of the average unemployment rate for the United States or for the state in which such county is located, whichever is less, based on the most recent data available from the Secretary of Labor; or (C) a designated "difficult development area" is located. Difficult development areas are designated by the Secretary of Housing and Urban Development.[92] They can *only* be designated in Alaska, Hawaii, and territories or possessions of the United States outside the 48 contiguous states.[93]
3. ***lands within the external boundaries of Indian reservations***.
4. ***redesignated areas***, or census tracts or nonmetropolitan counties that cease to be qualified under the criteria described above. Such areas retain their status as HUBZones only until the later of (1) the date on which the Census Bureau publicly releases the first results from the 2010 decennial census or (2) three years after the date on which the census tract or nonmetropolitan county ceases to be qualified.
5. ***base closure areas***, or lands within the external boundaries of a military installation that were closed through a privatization process under the authority of (1) the Defense Base Closure and Realignment Act of 1990; (2) title II of the Defense Authorization Amendments and Base Closure and Realignment Act of 1988; (3) Section 2687 of Title 10 of the United States Code; or (4) any other provision of law authorizing or directing the Secretary of Defense or the secretary of a military department to dispose of real property at a military installation for purposes relating to base closures or redevelopment, while retaining the authority to enter into a leaseback of all or a portion of the property for military use.[94]

Small firms located in HUBZones that meet certain eligibility requirements—key among which is that at least 35% of their employees also live in HUBZones[95]—are eligible for three different types of preferences in federal contracting. First, agencies may set-aside contracts for competitions in which only HUBZone small businesses can compete so long as the contracting officer reasonably expects that at least two qualified HUBZone small businesses will submit offers and the award can be made at fair market price.[96] Second, when the contracting officer does

[91] This is the definition of "qualified census tract" contained in 26 U.S.C. § 42(d)(5)(B)(ii).

[92] 26 U.S.C. § 42(d)(5)(C)(iii).

[93] *Id.*

[94] 15 U.S.C. § 632(p)(1).

[95] 15 U.S.C. § 632(p)(5)(A)(i)(I)(bb). Firms must also be (1) "small" under the Small Business Administration's (SBA's) size standards; (2) at least 51% owned by U.S. citizens; and (3) certified by the SBA. 15 U.S.C. § 632(p)(5)(A) (size); 15 U.S.C. § 632(p)(3) (U.S. citizenship); 15 U.S.C. § 632(p)(5)(A) (SBA certification). The firm is also subject to limitations on subcontracting and must perform certain percentages of work on contracts that it receives under the HUBZone program with its own employees. 15 U.S.C. § 632(p)(5)(A)(i)(III)(aa)-(bb).

[96] 15 U.S.C. § 657a(b)(2)(B). Originally, contracts were set aside for HUBZone firms that were also participants in the (continued...)

not reasonably expect at least two qualified HUBZone small businesses to submit offers, agencies can make sole-source awards to such businesses in circumstances in which they could not generally make sole-source awards to other businesses. While agencies are normally required to find that specific circumstances exist before making a sole-source award (e.g., single source for goods and services, unusual and compelling urgency), they may make sole-source awards to HUBZone small businesses so long as (1) the HUBZone small business is found to be a responsible contractor with respect to the performance of the contract; (2) the anticipated price of the contract does not exceed $4 million ($6.5 million for manufacturing contracts); and (3) the contracting officer determines that the award can be made at a fair and reasonable price.[97] Third, agencies may generally grant a 10% price evaluation preference to offers submitted by HUBZone small businesses in competitions that are open to all firms.[98] Additionally, there are goals for the percentage of federal contract dollars awarded to HUBZone small businesses government-wide and by agency.[99]

The preference for HUBZone firms is not absolute. Procurements may not be made through the HUBZone program, using any form of HUBZone preference, if they "would otherwise be made from a different source under section 4124 or 4125 of title 18 or the Javits-Wagner-O'Day Act."[100] This provision effectively assures that the Federal Prison Industries program and nonprofit agencies for the "blind or severely disabled" take precedence over HUBZone firms. Additionally, requirements that have been performed under the 8(a) Program or accepted for the 8(a) Program cannot be awarded to HUBZone firms unless the SBA releases them.[101]

HUBZone set-asides were once viewed by GAO and the federal courts as having "precedence" over set-asides for other types of small businesses (e.g., 8(a) small businesses, service-disabled veteran-owned small businesses) because set-asides under the HUBZone Act were "mandatory," when certain conditions were met, while other set-asides were "discretionary."[102] However, this

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8(a) Minority Business Development Program before being set aside for HUBZone firms that were not 8(a) participants. *See* 13 C.F.R. § 126.607(b) (1999). However, this requirement was later removed.

[97] 15 U.S.C. § 657a(b)(2)(A)(i)-(iii).

[98] 15 U.S.C. § 657a(b)(3)(A). The price evaluation preference works as follows: if a non-HUBZone business bids $100,000 and a HUBZone small business bids $110,000, the HUBZone small business would win because, after its offer is reduced by 10% ($11,000), it is the lower bidder. The amount of the price evaluation preference is not always 10% when the Secretary of Agriculture purchases agricultural commodities for any purpose, including for export operations through international food aid programs administered by the Farm Service Agency. 15 U.S.C. § 657a(b)(3)(B)-(C).

[99] 15 U.S.C. § 644(g)(1)-(2). By statute, the government-wide goal must be at least 3%. The agency-specific goals are set by agencies in consultation with the SBA, and are 3% for most agencies. The government-wide goal for HUBZone small businesses includes only federal contracts, not subcontracts, unlike the goals for service-disabled veteran-owned small businesses, women-owned small businesses, and small businesses owned and controlled by socially and economically disadvantaged individuals. However, legislation introduced in the 111th Congress would change this. *See* Small Business Contracting Programs Parity Act of 2009, S. 1489, § 3(b).

[100] 15 U.S.C. § 657a(b)(4).

[101] 13 C.F.R. § 126.605(b) ("A contracting activity may not make a requirement available for a HUBZone contract if ... [a]n 8(a) participant currently is performing the requirement through the 8(a) … program or SBA has accepted the requirement for award through the 8(a) … program, unless SBA has consented to release the requirement from the 8(a) … program.").

[102] *See generally* CRS Report R40591, *Set-Asides for Small Businesses: Recent Developments in the Law Regarding Precedence Among the Set-Aside Programs and Set-Asides Under Indefinite-Delivery/Indefinite-Quantity Contracts*, by Kate M. Manuel.

preference was never widely implemented because the Obama Administration declined to follow the GAO's recommendations that HUBZone set-asides be used instead of other set-asides whenever possible.[103] The Administration also construed a March 2, 2010, decision by the U.S. Court of Federal Claims finding that HUBZone set-asides have precedence over 8(a) set-asides as applying only to the procurement at issue in that case.[104] Although an August 13, 2010, decision by this same court permanently enjoined the executive branch from relying on its interpretation of the Small Business Act, which provided for "parity" among the set-aside programs,[105] the Small Business Jobs and Credit Act of 2010, enacted on September 27, 2010, amended the HUBZone Act by removing the language which prompted GAO and the courts to find that HUBZone set-asides had "precedence" over 8(a) and other set-asides.[106] Thus, only in procurements conducted between August 13, 2010, and September 27, 2010, were agencies clearly required to give precedence to HUBZone set-asides.

Table 1. Comparison of Procurement Preferences for "Local Contractors," Labor Surplus Area Concerns, and HUBZone Small Businesses

Category	Eligibility & Applicability	Preference Type
"Local Contractors"	Vendors must "reside or do business primarily" in a presidentially declared disaster or emergency area Preference only for contracts for debris clearance, distribution of supplies, reconstruction, and other major disaster assistance activities Set-asides can be limited to small businesses	Set-Asides Evaluation preferences
Labor Surplus Area Concerns	Vendors must be located in a "civil jurisdiction" with an unemployment rate 120% of the national average or 10% or higher Vendors must "small" under the SBA's size standards to be eligible for tie-breaker	Tie-breaker in sealed bid procurements Evaluation factor in certain negotiated procurements[a]

[103] *See* Office of Legal Counsel, Department of Justice, Permissibility of Small Business Administration Regulations Implementing the Historically Underutilized Business Zone, 8(a) Business Development, and Service-Disabled Veteran-Owned Small Business Concern Programs, August 21, 2009, *available at* http://www.usdoj.gov/olc/2009/sba-hubzone-opinion082109.pdf. Because GAO is a legislative-branch agency, the "separation of powers" doctrine prevents its recommendations from being legally binding upon executive-branch agencies. *See* Ameron, Inc. v. U.S. Army Corps of Eng'rs, 809 F.2d 979, 986 (3d Cir. 1986). Rather, agencies are required by statute to notify GAO within 65 days after receiving its recommendations if they do not intend to implement them, and GAO, in turn, must notify four committees of Congress. 31 U.S.C. § 3554(b)(3) (Senate Committee on Homeland Security and Governmental Affairs, Senate Committee on Appropriations, House Committee on Oversight and Government Reform, House Committee on Appropriations).

[104] U.S. Department of Justice, Civil Division, Re: Mission Critical Solutions v. United States, No. 09-864 (Fed. Cl.) (Feb. 26, 2010), Mar. 17, 2010 (letter on file with the author). The judge in this case, *Mission Critical Solutions v. United States*, 91 Fed. Cl. 386 (2010), did not explicitly enjoin the government from making future awards based on the SBA's view that there is "parity" among the set-aside programs, and the Director of the Commercial Litigation Branch of the Civil Division at the U.S. Department of Justice (DOJ) subsequently stated that the court's injunction "applie[d] only to the specific contract at issue in this case and not to operation of the SBA's parity rule more generally." Agencies were thus instructed to continue applying the parity rule in their other procurements.

[105] DGR Assocs., Inc. v. United States, No. 10-396C, 2010 U.S. Claims LEXIS 588 (Aug. 13, 2010).

[106] *See* P.L. 111-240, § 1347,—Stat.—(Sept. 27, 2010).

Category	Eligibility & Applicability	Preference Type
HUBZone Small Businesses	Vendors must be located in a qualified census tract, qualified nonmetropolitan county, lands within the external boundaries of Indian reservations, "redesignated areas," or base closure areas Preferences not applicable if requirements would have been procured through Federal Prison Industries or from nonprofit agencies for the "blind or severely disabled;" requirements procured through or accepted for the 8(a) Program must be released by SBA before they can be awarded through the HUBZone program	Set-asides Sole-source awards 10% price evaluation preference

Source: Congressional Research Service

a. Formerly, labor surplus area concerns were also eligible for price preferences, set-asides, and subcontracting programs. *See supra* notes 69-83 and accompanying text.

Miscellaneous Provisions

In addition to these government-wide preferences, there are other location-based preferences that are agency-specific. This section does not attempt to provide a comprehensive listing of such provisions. However, it does give examples of major "types" of agency-specific preferences.

First, there are provisions in appropriations acts authorizing specific agencies to give "special consideration" to offers from "local"[107] vendors when evaluating proposals,[108] or award contracts to "local" vendors "notwithstanding Federal Government procurement and contracting laws," which generally bar agencies from preferring local vendors by requiring full and open competition.[109] These provisions generally involve contracts for specific activities, such as "forest hazardous fuels reduction, watershed or water quality monitoring or restoration, wildlife or fish population monitoring, or habitat restoration or management,"[110] and apply only to funds appropriated under the act.[111] They are generally not codified.

Second, there are provisions in program authorization acts or other acts that prefer foreign vendors who are "local" for purposes of the contract being performed because of U.S. military or diplomatic interests. The National Defense Authorization Act for FY2010 includes such a preference for "products and services produced in countries along a major route of supply to

[107] "Local" is not defined for purposes of this provision.

[108] Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, P.L. 111-88, § 413, 123 Stat. 2958-59 (Oct. 30, 2009) ("In awarding a Federal contract with funds made available by this Act, notwithstanding Federal Government procurement and contracting laws, the Secretary of Agriculture and the Secretary of the Interior (the "Secretaries") may, in evaluating bids and proposals, give consideration to local contractors who are from, and who provide employment and training for, dislocated and displaced workers in an economically disadvantaged rural community, including those historically timber-dependent areas that have been affected by reduced timber harvesting on Federal lands and other forest-dependent rural communities isolated from significant alternative employment opportunities.").

[109] *Id.*, 123 Stat. 2959 ("[N]otwithstanding Federal Government procurement and contracting laws the Secretaries may award contracts, grants or cooperative agreements to local non-profit entities, Youth Conservation Corps or related partnerships with State, local or non-profit youth groups, or small or micro-businesses or disadvantaged businesses.").

[110] *Id.*

[111] Such preferences could, however, be given quasi-permanent effect by being included in consecutive appropriations acts.

Afghanistan."[112] Where such products and services are involved, the Department of Defense may set aside procurements for local vendors or grant other unspecified "preferences" if the Secretary of Defense makes certain determinations about the proposed use of the products or services and the effects of restricting competition.[113] Such authorities are often temporary, expiring on specific dates, and are also generally not codified.[114]

Finally, there are provisions that effectively give residents of "noncontiguous states," including Alaska, Hawaii, and certain territories and outlying islands, preference as employees on military construction or service contracts performed, in whole or in part, in the state. Whenever the state unemployment rate exceeds that national average, contractors awarded such contracts must employ "individuals who are residents of that noncontiguous State and who, in the case of any craft or trade, possess or would be able to acquire promptly the necessary skills to perform this contract."[115] This requirement can be waived only by the Secretary of Defense on a case-by-case basis in the interest of national security.[116] This preference originated as an appropriations rider in 1999,[117] but it was made permanent and codified in 2006.[118]

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[112] P.L. 111-84, § 801, 123 Stat. 2399-400 (Oct. 28, 2009).

[113] *Id.*, 123 Stat. 2399 ("A determination described in this subsection is a determination by the Secretary that—(1) the product or service concerned is to be used—(A) in the country that is the source of the product or service; (B) in the course of efforts by the United States and the NATO International Security Assistance Force to ship goods to Afghanistan in support of military or stability operations in Afghanistan; or (C) by the military forces, police, or other security personnel of Afghanistan; (2) it is in the national security interest of the United States to limit competition or provide a preference as described in subsection (a) because such limitation or preference is necessary (A) to reduce overall United States transportation costs and risks in shipping goods in support of military or stability operations in Afghanistan; (B) to encourage countries along a major route of supply to Afghanistan to cooperate in expanding supply routes through their territory in support of military or stability operations in Afghanistan; or (C) to help develop more robust and enduring routes of supply to Afghanistan; and (3) limiting competition or providing a preference as described in subsection (a) will not adversely affect—(A) military or stability operations in Afghanistan; or (B) the United States industrial base.").

[114] *Id.*, 123 Stat. 2400.

[115] 48 C.F.R. §§ 222.7000—222.7002.

[116] 48 C.F.R. § 222.7003.

[117] Department of Defense Appropriations Act, 2000, P.L. 106-79, § 8071, 113 Stat. 1245 (Oct. 25, 1999).

[118] Department of Defense Appropriations Act, 2007, P.L. 109-289, § 8048, 120 Stat. 1284 (Sept. 29, 2006) (codified at 10 U.S.C. § 2304 note).