January 31, 2019

Via Regulatory Portal

Ms. Mariana Pardo
Director, HUBZone Program
U.S. Small Business Administration
409 Third Street SW, 8th Floor
Washington DC 20416

Re: Comments on SBA Proposed Rule, Amendment of the HUBZone Program, 83 Fed. Reg. 54812 (Oct. 31, 2018); RIN 3245-AG38

Dear Ms. Pardo,

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (“Section”), I am submitting comments on the proposed rule cited above. The Section consists of attorneys and associated professionals in private practice, industry, and government service.1 The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The views expressed herein are presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the position of the ABA.2

1 Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Scott Flesch, Marian Blank Horn, and Kristine Kassekert, members of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

2 This letter is available in pdf format at https://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments/under the topic “Small Business and Socioeconomic Issues.”
I. BRIEF SUMMARY OF PURPOSE FOR PROPOSED HUBZONE REGULATION

The U.S. Small Business Administration ("SBA") proposes to amend its regulations for the Historically Underutilized Business Zone ("HUBZone") Program to reduce the regulatory burdens imposed on HUBZone small business concerns and government agencies, implement new statutory provisions, and eliminate ambiguities in the regulations.

In summarizing the proposed rule, the SBA has signaled that it has reviewed all of its HUBZone regulations and is proposing a comprehensive revision to the HUBZone Program to clarify current HUBZone Program policies and procedures and to make changes that will benefit the small business community by making the HUBZone Program more efficient and effective. The SBA intends for the proposed amendments to make it easier for small business concerns to understand and comply with the program's requirements and to make the HUBZone program a more attractive avenue for procuring agencies.

II. COMMENTS

The Section is pleased to offer comments on the SBA’s proposed comprehensive regulatory amendment to the HUBZone Program (the “Proposed Rule”). The Section agrees that the Proposed Rule results in important clarifications and modifications to several regulations implementing the program to reflect SBA’s current policies, to eliminate ambiguities in the regulations, and to reduce burdens on small businesses and procuring federal agencies.

The Section first responds to the SBA’s specific requests throughout the Proposed Rule. The Section next provides comments on particularly positive amendments made by the Proposed Rule. Finally, the Section concludes by suggesting one matter that the SBA may want to consider when implementing the Proposed Rule.

A. The Section’s Response to Specific SBA Requests for Comments.

1. The SBA requests comments on whether seasonal employees can or should be counted and still maintain the integrity of the eligibility requirements.

The Section believes seasonal employees should not be counted. Seasonal employment does not guarantee employment in the future and does not help meet the goal of increasing stable employment in HUBZone areas. Seasonal employment may still be a welcome opportunity in some cases, but the Section anticipates significant logistical issues for fairly accounting for these positions in determining a HUBZone concern’s compliance.

2. The SBA requests comments on how best to look at the 20% HUBZone employee minimum requirement.

The Section agrees that the 20% minimum should be calculated once hiring for contract performance is complete. Otherwise, the order of hires may impact the concern’s compliance with the rule. The order of hires should be irrelevant, so long as HUBZone employees are ultimately hired. To do otherwise is to penalize the business for hiring order, which is not in line...
with the goals of the HUBZone program. However, to distinguish between new hires, which the Section recommends should be counted, and seasonal employees, which the Section recommends should not, the Proposed Rule should not count towards the employee minimum requirement new hires that were employed by the business within the prior twelve months.

3. The SBA requests comments as to whether a different percentage (other than 20%) is also reasonable and would accomplish the objectives of the HUBZone program while not unduly burdening firms performing HUBZone contracts.

The Section finds that 20% is a fair percentage that allows significant flexibility for firms attempting to meet HUBZone requirements. However, a floor often becomes a ceiling; there is risk that the 20% figure will undermine the program’s 35% goal. Nevertheless, the Section believes the rule is written to encourage diligent hiring.

4. The SBA requests comments on the number of hours SBA should require in order to count an individual as an employee of the firm for HUBZone eligibility purposes.

The Section believes that the standard should be increased from 40 hours per month to 20 hours per week. The purpose of the HUBZone program is to create jobs in the HUBZones, and 40 hours per month would be insufficiently stable work for most employees, in the Section’s view.

5. The SBA requests comments on whether SBA should count only full-time employees or full-time equivalents.

The SBA should not count only full-time employees or full-time equivalents. To do so would likely have the effect of reducing jobs instead of increasing them. Part-time work is still a valuable contribution to a HUBZone area. Concerns about part-time employees are sufficiently addressed by increasing the hours required to be worked from 40 hours per month to 20 hours per week.

6. The SBA requests comments on whether it is reasonable to continue treating individuals who receive in-kind compensation commensurate with the work performed as employees, and on how to measure whether in-kind compensation is commensurate with work performed.

Determining compliance with in-kind compensation is difficult and the situation likely does not arise often. Not counting those who receive in-kind compensation as employees is a more straightforward system with fewer difficult compliance issues. Therefore, the Section recommends eliminating individuals who receive in-kind compensation from the definition of “employee.”
7. **The SBA requests comments on proposed changes to the definition of “employee.”**

The Section believes this broader question is addressed in the other, more specific questions.

8. **The SBA requests comments on how the SBA should treat individuals who are employed through an agreement with a third-party business that specializes in providing HUBZone resident employees to prospective HUBZone small business concerns for the specific purpose of achieving and maintaining HUBZone eligibility.**

The Section recommends that these employees count toward eligibility goals. The use of a third-party business to facilitate the hiring of employees from HUBZone areas is simply a tool for achieving the goals of the program. Either way, the end result is increased employment in the HUBZone. If the SBA’s concern is that one employee might, for example, perform 10 hours per week for four different HUBZone concerns, then a better approach to addressing that type of concern would be to increase the hours requirement for employees (note that the Section recommends 20 hours per week, above). However, the Section is not concerned with several companies counting the same employee performing for them. In the example given, the four companies in question are employing the individual for 40 hours per week. Allowing multiple companies to hire the same employee through a specialty firm thus may enable HUBZone employees to achieve sufficient hours of work during the week. Moreover, a third-party business supplying employees to a HUBZone contractor may provide a mechanism for more stable, continuing employment for the employee, rather than resulting in loss of a job when a particular contract is completed.

9. **The SBA requests comments on the proposed changes to the definition of “principal office.”**

The Section agrees that, for a location to be a principal office, the concern’s business must be conducted there. However, there are foreseeable complications with the requirement that an employee spend 50% of their time at any one location. Many management positions require employees to visit all locations and sites throughout a month, but the employee still works out of the principal office. For example, managers in food service must travel to various sites to oversee work there. The Section therefore recommends removing that proposed requirement.

10. **The SBA requests comments on the proposed changes to the definition of “reside.”**

The Section agrees that removing the reference to primary residence and eliminating the requirement that individuals demonstrate an intent to live somewhere indefinitely are reasonable changes. Further, we find it reasonable to define “reside” as living at a location full-time and for at least 180 days immediately prior to the date of application or recertification, as applicable, but the Section would recommend broadening location to include any combination of residences within the same HUBZone. The Section believes an employee should not be excluded from
consideration by the happenstance of having moved a short distance in the preceding six months. The Section also agrees that an individual temporarily residing overseas in connection with the performance of a contract should still be considered for HUBZone purposes to reside at his or her U.S. residence. The Section, however, recommends that this be broadened to include temporary foreign residence due to military service, in addition to temporary foreign residence due to contract performance.

11. The SBA requests comments on the below inclusion in the definition of “reside” regarding performance of work overseas:

An individual who already qualified as a HUBZone resident for a certified HUBZone small business would continue to be treated as a resident of a HUBZone for HUBZone program eligibility purposes as long as he or she continued to work for the same certified HUBZone small business. SBA believes that this proposal strikes the right balance between acknowledging the increased prevalence of overseas contracting by small businesses and the need to ensure that the program benefits HUBZone areas.

The Section agrees that this definition strikes a fair balance: SBA should consider the residence in the United States as an employee’s residence if that employee is working overseas for a period of the contract.

B. Section’s Support of Additional Positive Amendments Made by the Proposed Rule.

The Section expresses support for the proposed change to require only annual recertification rather than at the time of every offer for a HUBZone contract and every award. This greatly reduces the compliance burden on HUBZone concerns; the predetermined date of recertification permits businesses to better comply with employment requirements.

C. Suggested Further Consideration.

The Section suggests that the SBA should consider whether to have an exception for contracts subject to the non-displacement of qualified workers. To do otherwise places a heavy compliance burden on HUBZone concerns. The contractor cannot know or control which employees accept offers under the rule or where they live. Although the introduction of the annual recertification, rather than immediate recertification for each offer, means that hiring these qualified workers might not have an immediate impact, the concern may still fall below the 20% threshold based on acceptance of offers the concern is contractually obligated to provide. The concerns should not be penalized for meeting their obligations under the non-displacement rule by elimination from the HUBZone program.
III. CONCLUSION

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Kara M. Sacilotto
Chair, Section of Public Contract Law

cc: Linda Maramba
Susan Warshaw Ebner
Jennifer L. Dauer
Annejanette Heckman Pickens
Council Members, Section of Public Contract Law
Chairs and Vice Chairs, Small Business & Other Socioeconomic Programs Committee
Craig Smith
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