

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

SMALL BUSINESS ADMINISTRATION

13 CFR Part 126

HUBZone Program

AGENCY: Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The Small Business Administration (SBA) proposes to amend its regulations governing the HUBZone Empowerment Contracting Program (HUBZone program). Now that SBA has officially launched the program, has received over two thousand applications for HUBZone certification, and has certified concerns into the program, SBA believes that it should make the following four regulatory amendments and clarifications to improve the administration and operation of the HUBZone program. First, SBA proposes to amend the provisions governing the application of the HUBZone program to various government departments and agencies. It proposes to add three federal agencies to the current list of agencies that are affected directly by the HUBZone program and to clarify that the HUBZone program does not apply to contracts awarded by state and local governments. Second, SBA proposes to amend the definition of the term "principal office" to accommodate those concerns whose industries require employees to perform their work at various job sites. Third, SBA proposes to eliminate the existing program eligibility restrictions on allowable affiliations of HUBZone small business concerns, since those requirements have proven to be unduly burdensome on otherwise eligible concerns. Finally, SBA proposes to ease the program eligibility requirements and procurement restrictions concerning qualified HUBZone small business concerns that operate as non-manufacturers because those requirements are unnecessary and overly restrictive.

DATES: Submit comments on or before November 2, 2000.

ADDRESSES: Send your comments to Michael McHale, Associate Administrator for the HUBZone Program, 409 Third Street, SW, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Michael McHale, Associate Administrator for the HUBZone Program, (202) 205-6731 or hubzone@sba.gov.

SUPPLEMENTARY INFORMATION: The HUBZone program was established pursuant to the HUBZone Act of 1997 (HUBZone Act), Title VI of the Small Business Reauthorization Act of 1997, Pub. L. No. 105-135, enacted December 2, 1997. The purpose of the HUBZone program is "to provide for Federal contracting assistance to qualified HUBZone small business concerns." 15 U.S.C. 657a(a). The HUBZone Act authorizes the SBA Administrator to publish regulations implementing the program. Pub. L. No. 105-135, § 605. On April 2, 1998, SBA published its proposed rules for the HUBZone program. 63 FR 16148. After the close of the public comment period and review of the comments, SBA published its final regulations, which became effective on September 9, 1998. 63 FR 31896 (June 11, 1998). The final HUBZone regulations, among other things, set forth the definition of key terms used in the regulations, the criteria for qualification as a HUBZone small business concern (SBC) and the Federal contracting assistance available to qualified HUBZone SBCs.

Based upon the operation of the program since the effective date of the final HUBZone regulations, SBA has become aware of certain amendments that it believes should be made to the program's regulations. SBA proposes these amendments to clarify existing regulations, streamline the operation of the HUBZone program and ease program eligibility requirements perceived to be burdensome on concerns.

SBA proposes to amend § 126.101, concerning the application of the HUBZone program to various government departments and agencies. Specifically, paragraph (a) of that section lists the ten federal agencies to which the HUBZone Act originally applied and provides in paragraph (b) that after September 30, 2000, the HUBZone program will apply to all federal departments and agencies which

employ one or more contracting officers as defined by 41 U.S.C. 423(f)(5). On November 29, 1999, Congress enacted Pub. L. 106-113. Section 212 of that statute requires that the HUBZone Act also apply to three additional agencies: the Department of Commerce, the Department of Justice, and the Department of State. This proposed rule would add these three federal agencies to the list in paragraph (a).

This proposed rule would also add a new paragraph (c) to § 126.101, to make clear that the HUBZone program does not apply to contracts awarded by state and local governments, since the HUBZone Act only applies to the federal government. The proposed paragraph (c) would also indicate that state and local governments that have programs similar to the HUBZone program are free to use SBA's List of qualified HUBZone SBCs to identify such concerns.

SBA proposes to amend the definition of "principal office." Currently, § 126.103 defines "principal office" to mean the location where the greatest number of the concern's employees at any one location perform their work. SBA proposes to amend that definition to accommodate those concerns whose primary industry requires employees to perform their work at various job sites. SBA received several comments on this definition of "principal office" when it originally proposed the current rule, but believed that the definition would not prevent those concerns from participating in the HUBZone program. See 63 FR 31898. SBA has re-evaluated this definition in light of experience and has found that maintaining compliance with the current definition of "principal office" is difficult for those concerns engaged in the service and construction industries because under this definition, their principal office is subject to change from contract to contract. As a result, SBA proposes that for concerns whose primary industry is services or construction (*i.e.*, other than manufacturing), the principal office would be the location where the greatest number of the concern's employees perform their work, but excluding those employees who perform their work at job-site locations to fulfill specific contract obligations. For example, a construction concern might have an office in a HUBZone where 10 employees perform their work. This

same firm might have a construction contract at a local government facility not located in a HUBZone, where 50 of the concern's employees work to fulfill the obligations of the construction contract. According to the proposed definition, the concern's principal office would be in the HUBZone.

SBA requests public comment regarding our proposal to restrict this change only to the construction and service industries. We chose not to include manufacturing concerns in this change because such firms tend to operate with fixed plant, equipment and personnel tied to one location. Further, we believe that the exclusion of manufacturing firms from this revised definition is consistent with the purpose of the HUBZone Act of 1997, to both encourage employment opportunities and increase the level of investment in HUBZones.

Next, SBA proposes to amend § 126.204, which provides certain restrictions on the allowable affiliations of a qualified HUBZone SBC. Currently, § 126.204 permits a qualified HUBZone SBC to have affiliates only if those affiliates are qualified HUBZone SBCs, participants in the 8(a) Business Development (8(a) BD) program, or woman-owned businesses (WOBs). Although that restriction is not required by statute, SBA included it in both the proposed and final HUBZone regulations to ensure that the HUBZone program was implemented in a manner that supported rather than undermined existing programs designed to assist small businesses. 63 FR 16150. As a means of support to the 8(a) BD program, SBA explained in the preamble to the proposed HUBZone regulation that minimizing the restrictions on the participation of 8(a) BD participants in the HUBZone program would provide an additional source of government contract assistance for 8(a) BD participants and would therefore enhance the business development objectives of that program. 63 FR 16151. SBA also explained in the preamble that allowing WOBs the maximum opportunity to qualify as HUBZone SBCs would provide the type of assistance that Congress determined in the Small Business Act was necessary to remove the discriminatory barriers to the development of WOBs. *Id.* SBA adopted this approach in its final regulations. 63 FR 31899.

Since the effective date of the final HUBZone regulations, SBA has received over two thousand applications for certification under the HUBZone program. As a result of the limitation on allowable affiliations with only the three types of SBCs specified in the

current § 126.204, SBA has had to decline a number of otherwise eligible applicants for HUBZone certification. The restrictions likewise have operated to limit HUBZone certification of 8(a) BD participants and WOBs that have affiliates that are not themselves qualified HUBZone SBCs, 8(a) BD participants or WOBs. As a result 8(a) BD participants, WOBs, as well as other otherwise eligible SBCs alike, have been declined HUBZone certification by reason of the restriction in § 126.204. SBA now believes that the current affiliation requirement is unnecessarily restrictive and should be removed. In addition, the removal of this restriction will allow SBCs in non-HUBZone areas to establish new business ventures in HUBZones. This is especially critical due to the historical lack of investment capital in HUBZones and the need for such capital to establish new businesses that will promote economic development and create jobs.

Accordingly, SBA proposes to eliminate the existing restrictions on affiliation under § 126.204. The proposed § 126.204 would allow a qualified HUBZone SBC to have affiliates as long as it, when combined with its affiliates, is still small pursuant to SBA's size regulations contained in part 121 of this title.

Finally, SBA proposes to amend two separate, but related, provisions concerning non-manufacturers. The first proposed amendment would delete the eligibility requirement for non-manufacturers contained in § 126.206. Under this proposed rule, non-manufacturer HUBZone concerns would no longer be required to demonstrate that they can provide product or products manufactured by qualified HUBZone SBCs.

The second proposed amendment would revise § 126.601. Currently, that section provides that a qualified HUBZone SBC that operates as a non-manufacturer may submit an offer on a HUBZone contract for supplies only if the concern's small manufacturer is also a qualified HUBZone SBC. This proposed rule would amend that provision to allow qualified HUBZone SBCs that are non-manufacturers the opportunity to supply the product of any business for HUBZone contracts at or below \$25,000 in total value. The reason for this proposed change is that SBA believes that for many products purchased in small dollar quantities (at or below \$25,000), there are often too few or no small business manufacturers participating in the federal market.

Thus, SBA proposes to allow a qualified HUBZone SBC to use any manufacturer, including a large business, for HUBZone

contracts at or below \$25,000 in total value. This provision will encourage the participation of small business non-manufacturers that are located in HUBZones.

SBA believes that an exemption for contracts greater than \$25,000 would harm qualified HUBZone SBCs that are manufacturers and possibly impact the program's goal of attracting capital investment and jobs in HUBZones. SBA further believes that this proposed exemption for contracts under \$25,000 and the requirement in § 126.601 that a qualified HUBZone SBC that is a non-manufacturer may bid on HUBZone contracts for supplies only if the concern's small manufacturer is also a qualified HUBZone SBC, also support SBA's proposal to eliminate the eligibility requirement in § 126.206, that non-manufacturers demonstrate at the time of application that they can provide the product or products manufactured by a qualified HUBZone SBC. With respect to the proposed \$25,000 exemption, if the HUBZone contract is valued at or below the \$25,000 threshold, the SBC would not be required to use the products of a qualified HUBZone SBC and so should not be required to demonstrate that they would do so as a precondition to HUBZone certification. With respect to contracts above the \$25,000 threshold, § 126.601(d) requires qualified HUBZone SBCs to use a qualified HUBZone SBC manufacturer. It is therefore unnecessary to have a separate eligibility requirement that the concern demonstrate at the time of application that it can provide the product or products manufactured by a qualified HUBZone SBC.

SBA solicits comments from the public addressing the issues raised in this proposed rule, including more effective ways to address these issues and whether we have solved adequately the problems identified.

Compliance With Executive Orders 12866, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-602)

The Office of Management and Budget (OMB) reviewed this rule as a "significant" regulatory action under Executive Order 12866.

For purposes of Executive Order 12988, SBA has drafted this proposed rule, to the extent practicable, in accordance with the standards set forth in section 3 of that Order.

For purposes of Executive Order 13132, SBA has determined that this proposed rule has no federalism

implications warranting the preparation of a Federalism Assessment.

For purposes of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA has determined that this proposed rule does not impose new reporting or recordkeeping requirements.

SBA has determined that this proposed rule may have a significant beneficial economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, *et seq.* The amendments proposed in this rule involve revising the definition of "principal office" and eliminating certain requirements governing the allowable affiliations of qualified HUBZone SBCs and SBCs that operate as non-manufacturers. These amendments will affect a large percentage of the over 30,000 SBCs that SBA believes are now eligible or will become eligible for certification as qualified HUBZone SBCs over the life of the program. Thus, SBA has prepared an Initial Regulatory Flexibility Analysis (IRFA) and has submitted a complete copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. For a complete copy of the IRFA, please contact Michael McHale at (202) 205-6731.

The IRFA explains that this proposed rule will affect primarily those SBCs that participate in Federal procurements, that have affiliates, or that are non-manufacturers. The proposed rule will make it easier for qualified SBCs to participate in the program because it provides a definition of "principal office" that accommodates the fluid nature of the construction and service industries and it allows qualified HUBZone SBCs to have any affiliates provided that they, together with their affiliates, do not exceed their applicable size standard under part 121 of title 13 of the Code of Federal Regulations. This proposed rule will also facilitate the certification of qualified HUBZone SBCs and open the door to more HUBZone contracts by eliminating the eligibility requirement that non-manufacturers must demonstrate that they can supply the goods of a qualified SBC as a prerequisite for program certification, and by exempting non-manufacturers from making that showing when submitting offers to supply goods for HUBZone contracts with a total value of \$25,000 or less.

The IRFA further explains that these proposed amendments do not duplicate, overlap or conflict with relevant Federal regulations. It also indicates that SBA has reviewed several alternatives to the proposed amendments and that it

believes that the amendments proposed are in the best interest of SBCs and the HUBZone Program.

(Catalog of Federal Domestic Assistance Programs, No. 59,009)

List of Subjects in 13 CFR Part 126

Administrative practice and procedure, Government procurement, Reporting and recordkeeping requirements, Small businesses.

Accordingly, for the reasons set forth above, SBA proposes to amend 13 CFR part 126, as follows:

PART 126—HUBZONE PROGRAM [AMENDED]

1. Amend the authority citation for 13 CFR part 126 to read as follows:

Authority: 15 U.S.C. 632(a); Pub. L. 106-113 sec. 212, 113 Stat. 1537-289; Pub. L. 105-135 sec. 601 *et seq.*, 111 Stat. 2592.

2. Amend § 126.101 by removing paragraphs (a)(1) through (a)(10), by adding new paragraphs (a)(1) through (a)(13), and by adding a new paragraph (c) to read as follows:

§ 126.101 Which government departments or agencies are affected directly by the HUBZone program?

- (a) * * *
- (1) Department of Agriculture;
 - (2) Department of Commerce;
 - (3) Department of Defense;
 - (4) Department of Energy;
 - (5) Department of Health and Human Services;
 - (6) Department of Housing and Urban Development;
 - (7) Department of Justice;
 - (8) Department of State;
 - (9) Department of Transportation;
 - (10) Department of Veterans Affairs;
 - (11) Environmental Protection Agency;
 - (12) General Services Administration;
 - (13) National Aeronautics and Space Administration.

* * * * *

(c) The HUBZone program does not apply to contracts awarded by state and local governments. However, state and local governments may use the List of qualified HUBZone SBCs to identify qualified HUBZone SBCs for similar programs authorized under state or local law.

3. Amend § 126.103 to revise the definition of "principal office" to read as follows:

§ 126.103 What definitions are important in the HUBZone program?

* * * * *

Principal office means the location where the greatest number of the

concern's employees at any one location perform their work. However, for those concerns whose "primary industry" (see 13 CFR 121.107) is service or construction (see 13 CFR 121.201), the determination of principal office excludes the concern's employees who perform the majority of their work at job-site locations to fulfill specific contract obligations.

* * * * *

4. Revise § 126.204 to read as follows:

§ 126.204 May a qualified HUBZone SBC have affiliates?

A concern may have affiliates provided that the aggregate size of the concern and all its affiliates is small as defined in part 121 of this title.

5. Revise § 126.205 to read as follows:

§ 126.205 May non-manufacturers be certified as qualified HUBZone SBCs?

Non-manufacturers (referred to in the HUBZone Act of 1997 as "regular dealers") may be certified as qualified HUBZone SBCs if they meet all of the requirements set forth in § 126.200. "Non-manufacturer" is defined in § 121.406(b)(1) of this title.

6. Amend § 126.601 by revising paragraph (d) to read as follows:

§ 126.601 What additional requirements must a qualified HUBZone SBC meet to bid on a contract?

* * * * *

(d) A qualified HUBZone SBC which is a non-manufacturer may submit an offer on a HUBZone contract for supplies if it meets the requirements under the non-manufacturer rule as defined in § 121.406(b) of this title, and if the small manufacturer providing the end item for the contract is also a qualified HUBZone SBC. However, for HUBZone contracts at or below \$25,000 in total value, a qualified HUBZone SBC may supply the end item of any manufacturer, including a large business.

Dated: September 26, 2000.

Aida Alvarez,

Administrator.

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