



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

March 19, 2014

[REDACTED]

FINAL REDACTED VERSION
Available for Public Release

Cleveland, OH 44114

FAX: [REDACTED]

RE: HUBZone Protest for Solicitation No. [REDACTED]

Dear Mr. [REDACTED]

This letter is to notify you that I am denying the protest filed by [REDACTED] concerning the HUBZone status of [REDACTED]. [REDACTED] I have reviewed the protest allegations and the information [REDACTED] has submitted in response to the protest and have determined that [REDACTED] met the 35% HUBZone residency and principal office requirements at the time it submitted its offer and also meets the requirements at the present time. As such, [REDACTED] is eligible for the HUBZone award and eligible for the program. The following sets forth the bases for my decision.

1. Protest Allegations, Request for Information, and Site Visits Performed

In its protest, [REDACTED] argued that less than 35% of [REDACTED]'s employees reside in a HUBZone and that [REDACTED]'s principal office was not located in a HUBZone. [REDACTED] stated that [REDACTED] has several contracts, performance of which is not located in a HUBZone. As a result, [REDACTED] believed that [REDACTED]'s principal office may be located in or near one of these locations and it is difficult to hire employees that reside in a HUBZone. [REDACTED] had also argued that [REDACTED] shares employees with another company, [REDACTED]. [REDACTED] provided information showing that a certain individual is employed with both [REDACTED] and [REDACTED] simultaneously. Therefore, [REDACTED] argued that based on the totality of circumstances, [REDACTED] and [REDACTED] may be acting as one company and/or sharing employees. Because [REDACTED] had provided specific allegations that [REDACTED] may not meet the principal office or 35% HUBZone residency requirements, I found these protest allegations to be specific.

I therefore requested that [REDACTED] provide evidence, including supporting documents, showing that it met these requirements at the time it submitted its offer (April 30, 2013) and at the present time. In response to this request, [REDACTED] provided the following documents: a map showing that [REDACTED], Cleveland OH is in a HUBZone; utility bills for [REDACTED] at the [REDACTED] address; a signed and dated lease agreement

showing that [REDACTED] has been leasing space at [REDACTED], Cleveland OH since 2010; corporate income taxes for [REDACTED] for 2012 showing the address of [REDACTED] and that Mr. [REDACTED] is the sole owner of [REDACTED] the proposal for the solicitation at issue, which did not show any affiliation with another company; SBA's full document review determination, issued on March 14, 2012, showing that [REDACTED] was eligible for the HUBZone program; the Quarterly Unemployment Reports for the states of Arizona, Delaware, Colorado, Maryland, Ohio and Washington for the quarters ending June 2013 and December 2013; payroll for each job site and the principal office for the pay period ending January 22, 2014 and February 2, 2014 showing each employee, the wages, hours worked, deductions, and total pay; payroll for each job site and the principal office for the pay period ending April 14, 2013 showing each employee, the wages, hours worked, deductions, and total pay; copies of driver's licenses and corresponding maps showing the employee resides in a HUBZone; and copies of contracts showing the work locations for [REDACTED]'s jobs.

[REDACTED] also provided a statement that [REDACTED] is the sole owner and he is shown on the payroll, that [REDACTED] has no independent contractors at the time of offer or at present, and that all employees listed on the payroll are actual [REDACTED] employees. [REDACTED] also stated that [REDACTED] and [REDACTED] do not share employees and that [REDACTED] has no ownership in [REDACTED] and that no person affiliated with [REDACTED] has any interest, financially or management, in [REDACTED]. Further, [REDACTED] explained that Mr. [REDACTED] was an employee of [REDACTED] for about 1 ½ years and that Mr. [REDACTED] was later hired by [REDACTED]. Finally, [REDACTED] states that there is no affiliation with [REDACTED]. The state of Washington required [REDACTED] to establish a "doing business as" since there was another business in Washington with the same name.

After reviewing these documents, the HUBZone program office requested further information and clarification from [REDACTED]. Specifically, we requested the following: payrolls showing all employees and number of hours worked per week at the time [REDACTED] submitted its offer (April 30, 2013); additional payrolls prior to the February 2014 payrolls since there were several individuals that did not work at least 40 hours during the payroll provided; resubmission of one set of payrolls for 2014 with specific pay period dates shown; information concerning whether [REDACTED] shares office space with another company; additional contract information to show that [REDACTED] has current contracts and that employees are performing work at job site locations; legible driver's licenses or other information to support the assertion that twenty-five employees resided in a HUBZone since several licenses were too dark or blurry to read; unexpired licenses for ten employees; and information and documents showing whether one employee, which provided documents showing a new address dated 3/7/14 in a HUBZone, was located in a HUBZone prior to that time.

In response to this request, [REDACTED] provided a statement that there are two primary employees that work at the [REDACTED] location and that the managers who work on local contracts maintain desks at the office. [REDACTED] stated that it was able to acquire the space in anticipation of future growth. [REDACTED] also provided legible copies of the driver's licenses requested; the payroll for February 2, 2014 for one of the contracts;

the payrolls for January 19 and January 15, 2014; and the payroll for April 30 and May 12, 2013. Finally, [REDACTED] provided copies of all of its contracts showing job site locations.

In addition, SBA conducted an unannounced site visit to [REDACTED]. An employee from SBA's Cleveland district office visited [REDACTED] on March 13, 2014. Upon arrival, the employee saw that there was signage on the mailbox. The SBA employee also spoke to the mailman and asked if he knew where [REDACTED] was located. The mailman stated that they were located on the 4th floor and regularly received mail there. The SBA employee stated that [REDACTED]'s office is located in a historical building that has a variety of small rooms and that [REDACTED]'s suite has an open area and area for desks. The SBA employee saw computers, printers, copy machines and a break room in [REDACTED]'s suite. When the SBA employee arrived, the owner of [REDACTED] was on the phone with a customer. The SBA employee met with three [REDACTED] employees at the [REDACTED] location.

2. 35% HUBZone Residency Requirement

The HUBZone Act and the implementing regulations require that at least 35% of the HUBZone SBC's employees reside in a HUBZone. 15 U.S.C. § 632(p)(5)(A)(i)(I)(aa); 13 C.F.R. § 126.200(b). The SBA's HUBZone regulations define the term employee as follows:

Employee means all individuals employed on a full-time, part-time, or other basis, so long as that individual works a minimum of 40 hours per month. This includes employees obtained from a temporary employee agency, leasing concern, or through a union agreement or co-employed pursuant to a professional employer organization agreement. SBA will consider the totality of the circumstances, including criteria used by the IRS for Federal income tax purposes and those set forth in SBA's Size Policy Statement No. 1, in determining whether individuals are employees of a concern. Volunteers (i.e., individuals who receive deferred compensation or no compensation, including no in-kind compensation, for work performed) are not considered employees. However, if an individual has an ownership interest in and works for the HUBZone SBC a minimum of 40 hours per month, that owner is considered an employee regardless of whether or not the individual receives compensation.

13 C.F.R. § 126.103.

The regulations explain that SBA will make a determination of who should be considered an employee for the purpose of determining a firm's HUBZone eligibility based on the "totality of the circumstances, including criteria used by the IRS for Federal income tax purposes and those set forth in SBA's Size Policy Statement No. 1...." SBA Size Policy Statement No. 1 was published in the Federal Register on February 20, 1986, 51 Fed. Reg. 6099.

█████ has alleged that █████ and █████ are affiliates and that SBA should apply the “totality of circumstances” and find that employees of one are employees of the other, or, that the two share employees. In this case, there is no evidence that █████ and █████ are affiliated and sharing employees.¹ █████’s sole owner is Mr. █████. He has stated that he does not own part of █████ and that █████ does not provide financial or management assistance to █████. Also, █████ has provided copies of payrolls and contract documents showing that it hires a sufficient number of individuals to work for █████ on specific contracts. Further, █████ has provided copies of the state unemployment tax filings for the time of offer and the present time. The employees shown on the unemployment filings are the same as the employees listed on the payrolls. █████ also provided a copy of its proposal, which shows no evidence of affiliation with █████. Finally, the one individual that used to work for █████ left and went to work for █████. There is nothing unusual about this situation. As a result, the documents do not support a finding that the totality of circumstances applies such that any employees of █████ should be treated as employees of █████ or vice versa. I also did not find evidence that the two companies are sharing employees.

I will base my analysis of whether █████ meets the employee residency requirement on the individuals listed in the payrolls. According to the payroll records and other documents provided, including quarterly unemployment reports, for the pay period covering April 30, 2013, █████ had 209 employees who worked at least 40 hours in a month. At least 74 of █████’s employees must have resided in a HUBZone $(209 * 35\% = 73.15)$ ² to meet the 35% HUBZone residency requirement at the time it submitted its offer. Of these 209 employees, the payroll records and supporting documents provided, including driver’s licenses, evidence that 84 employees resided in a HUBZone. Thus, █████ did meet the HUBZone residency requirement at the time it submitted its offer.

According to the payroll records and other documents provided, including quarterly unemployment reports, for the pay period covering the present time, █████ has 208 employees who work at least 40 hours in a month.³ At least 73 of █████’s employees must reside in a HUBZone $(208 * 35\% = 72.8)$ to meet the 35% HUBZone residency requirement at the time it submitted its offer. Of these 208 employees, the payroll records and supporting documents provided, including driver’s licenses, evidence that 86 employees reside in a HUBZone. Thus, █████ does meet the HUBZone residency requirement at the present time.

¹ This determination is consistent with SBA’s size determination, issued March 5, 2014.

² The SBA’s regulations provide that: “When determining the percentage of employees that reside in a HUBZone, if the percentage results in a fraction, round up to the nearest whole number.” 13 C.F.R. § 126.200(b)(4).

³ Several employees worked less than 40 hours in the initial pay period reviewed so we reviewed the preceding payroll to confirm that these employees work 40 hours in a month.

Consequently, at the time of offer and at the present time, [REDACTED] met the 35% HUBZone residency requirement. I am denying this protest allegation.

3. HUBZone Principal Office Requirement

The Small Business Act and implementing regulations require that, with the exception of certain specified entities, qualified HUBZone small business concerns have a principal office located in a HUBZone. 15 U.S.C. § 632(p)(5)(A)(i)(I)(aa); 13 C.F.R. § 126.103. The statute and regulations define a HUBZone to mean an area located within one or more qualified census tracts, qualified non-metropolitan counties, lands within the external boundaries of an Indian reservation, redesignated areas, or base closure areas. Id. § 632(p)(1); 13 C.F.R. § 126.103.

SBA regulations define the term “principal office” as follows:

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 121.201) is service or construction (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.

13 C.F.R. § 126.103. Because [REDACTED]’s primary industry is represented by NAICS code 561210, “Facilities Support Services,” the determination of its principal office excludes those employees who perform the majority of their work at job site locations to fulfill specific contract obligations. I note that with respect to the definition of principal office, the SBA recognizes in its regulations that qualified HUBZone SBCs may have more than one office, including “offices or facilities in another HUBZone or even outside a HUBZone and still be a qualified HUBZone SBC.” Id. § 126.207. However, in order to qualify for the program, the concern’s principal office must be located in a HUBZone. Id.

I have reviewed all of the documents provided, including the payroll, [REDACTED]’s contracts, and quarterly unemployment reports. I have determined that, in accordance with the regulations, at the time of offer 2 employees worked at the [REDACTED] and the rest worked at job sites. Therefore, at the time of offer, the greatest number of the [REDACTED]’s employees did perform their work in a HUBZone.

I have also determined that at the present time, 2 employees work at the [REDACTED] location and the rest work at job sites. Therefore, at the present time, the greatest number of the [REDACTED]’s employees perform their work in a HUBZone.

Consequently, at the time of offer and at the present time, [REDACTED]’s principal office was located in a HUBZone. I am denying this protest allegation.

4. Appeal Rights

█ the protester, or the contracting officer may appeal this decision pursuant to 13 C.F.R. § 126.805. All appeals must be made to the Associate Administrator for Government Contracting and Business Development (AA/GC&BD) within five business days from receipt of this letter. The appeal may be sent by facsimile, express delivery service, or U.S. mail (postmarked within the applicable time period), or via hand delivery. The AA/GC&BD may be reached at the U.S. Small Business Administration, 409 3rd Street, SW, Suite 8000, Washington, DC 20416, by facsimile at (202) 205-5206, or by e-mail at hzappeals@sba.gov. SBA will dismiss any appeal received after the five-day period. Pursuant to 13 C.F.R. § 126.805(d), the party bringing the appeal must provide a notice of the appeal to the contracting activity contracting officer and the protested concern. I have attached a copy of the appeal procedures.

5. Release of Decision

The SBA intends to make its HUBZone status protest and appeal decisions available to the public by posting them on its website at www.sba.gov/hubzone. As we noted in our initial letter, the Freedom of Information Act (FOIA), 5 U.S.C. § 552, requires the government to disclose records in its possession unless the information falls under one of the nine-enumerated exemptions, including that the information is a trade secret or is privileged or confidential commercial or financial information (5 U.S.C. § 552(b)(4)), or that the disclosure of the information would constitute an unwarranted invasion of individual privacy (5 U.S.C. § 552(b)(6)). We also explained in our initial letter that we will release in the protest decision the total number of employees of the protested concern, the total number of employees that are HUBZone residents, as well as the number of employees that work at a business' different offices.

The SBA has reviewed this decision letter and believes that no redactions to this document are necessary. However, each party to the protest shall refrain from releasing the decision until the end of the fifth business day following receipt of the decision by all parties. This permits parties to identify anything that they believe should have been redacted.

6. Small Business Regulatory Enforcement Fairness Act

If you believe your small business has been the subject of excessive or unfair regulatory enforcement or compliance actions as a result of this decision, you have the right under the Small Business Regulatory Enforcement Fairness Act to file a complaint or comment with SBA's National Ombudsman at:

Office of the National Ombudsman
U.S. Small Business Administration
409 Third St. SW
Washington, DC 20416
PH: 1-888-734-3247

FX: 1-202-481-5719

EM: ombudsman@sba.gov

The right to file a complaint or comment with SBA's National Ombudsman is independent of any other rights you may have to contest this decision. The National Ombudsman may not change, stop, or delay a Federal agency's enforcement action or impede any administrative or criminal process.

Thank you for your cooperation with this matter. If you have any questions, please contact me at hzprotests@sba.gov.

Sincerely,

Mariana Pardo
Director
HUBZone Program

cc via facsimile (w/attachments):

[REDACTED]
[REDACTED]
[REDACTED]
Email: [REDACTED]

[REDACTED]
[REDACTED]
FAX: [REDACTED]