



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

July 15, 2014

Sent Via Email

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
Oklahoma City, OK 73111-5218  
[REDACTED]  
FAX: [REDACTED]

RE: HUBZone Protest for Solicitation No. [REDACTED]

Dear Mr. [REDACTED]

This letter is to notify you that based on the information provided to me in a protest filed by [REDACTED] ([REDACTED] and [REDACTED]'s ([REDACTED] response to that protest, I am denying the protest. I have determined that [REDACTED] met the 35% HUBZone residency requirement at the time of offer and at the present time. This determination will be effective immediately and is final unless overturned on appeal. The following sets forth the bases for my decision.

1. Protest Allegations and Request for Information

In its protest, [REDACTED] argued that [REDACTED] may not meet the HUBZone program's 35% residency requirements because it is affiliated with [REDACTED] ([REDACTED] argues that [REDACTED] and [REDACTED] are both in the same or similar line of business and share common ownership, office space, phone numbers and fax numbers, among other things. [REDACTED] explained that [REDACTED] owns the building where [REDACTED] is located and [REDACTED] pays [REDACTED]'s phone bill. [REDACTED] also stated that [REDACTED] is owned by [REDACTED] who is [REDACTED]'s spouse, and argued that based on the totality of circumstances, [REDACTED] and [REDACTED] may be acting as one company and/or sharing employees and that combined, the companies do not meet the 35% residency requirement. [REDACTED] also noted that [REDACTED] has over 40 projects and this would make meeting the 35% residency requirement difficult. Because [REDACTED] had provided specific allegations that [REDACTED] may not meet the 35% HUBZone residency requirements, I found these protest allegations specific.

I therefore requested, via letter dated June 23, 2014, that [REDACTED] provide evidence, including supporting documents, showing that [REDACTED] met the 35% residency requirement at the time it submitted its offer (June 12, 2014) and at the present time.

In response to SBA's requests, on June 25, 2014, [REDACTED] provided the following: statements

explaining that all [REDACTED] officers appear on the firm's payroll; that [REDACTED] and affiliate [REDACTED] have a common majority stockholder, [REDACTED], which was disclosed in [REDACTED]'s HUBZone application; that Mrs. [REDACTED] is also the owner of [REDACTED]. [REDACTED] and that all affiliates are small women owned businesses and each has different directors and company officers; payroll dated 6/08-6/14/14 showing each employee, wages, hours worked and withholdings for [REDACTED] and [REDACTED] a statement that all employees are shown on the payrolls; a statement that [REDACTED] and [REDACTED] do not have any independent contractors as employees; a statement listing all [REDACTED] and [REDACTED] employees, the work location and HUBZone status; records of work locations for each employee of [REDACTED] and [REDACTED] unexpired driver's license for each employee of [REDACTED] and [REDACTED] HUBZone maps for each HUBZone employee; copies of unemployment tax filings for [REDACTED] and [REDACTED] a copy of [REDACTED]'s bid for the solicitation at issue in this protest; the Certificate of Good Standing, Certificate of Conversion, Operating Agreement, Articles of Organization, Entity Classification Election, Consent to Action without Meeting, and Certificate for Units for [REDACTED] the Certificate of Good Standing, Certificate of Name Change, stock ledger and stock certificates for [REDACTED] the Certificate of Good Standing, Certificate of Name Change, stock ledger and stock certificates for [REDACTED] the Operating Agreement for [REDACTED] the Operating Agreement for [REDACTED] showing that it is wholly owned by [REDACTED] copies of [REDACTED]'s and affiliate rental and utility bills or payments; and a copy of an Oklahoma County Assessor's property display for the [REDACTED] location.

[REDACTED] also provided information that it is affiliated with [REDACTED] and [REDACTED], neither of which has any employees. [REDACTED] also stated that it currently has 3 active projects, not 40; that [REDACTED] is Mr. [REDACTED] mother and not his wife; that [REDACTED] does not own the building where [REDACTED]'s office is located, that the building has five tenants, three of which are affiliated companies; and that each tenant in the building has their own phone numbers and fax numbers. Further, [REDACTED] states that it owns its own equipment, vehicles, office equipment furnishings and computers; all three affiliates have HUBZone employees; the majority owner of [REDACTED] has supported and mentored [REDACTED] to make it a successful HUBZone enterprise; and the two entities have separate customers ([REDACTED] focuses on Federal work and [REDACTED] focuses on municipal and state work), projects and employees. [REDACTED] has also stated that it provides estimating and construction management consulting services [REDACTED] and bills for these services, that [REDACTED] has one [REDACTED] and that [REDACTED] and that [REDACTED]

After reviewing these documents, we requested additional payroll to evidence that certain employees work at least 40 hours in a month. In response, [REDACTED] provided payroll for itself and its affiliates dated 5/03-6/07/14.

## 2. 35% HUBZone Residency Requirement

The HUBZone Act and the implementing regulations require that at least 35% of the HUBZone small business concern's (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). 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 (emphasis added).

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..." I note that in the preamble to the proposed rule defining the term "employee," SBA explained that:

....SBA's HUBZone regulations state that the totality of the circumstances, including factors relevant for tax purposes, will determine whether persons are employees of a concern. 13 CFR 126.103. That means that SBA will review the totality of circumstances to determine whether those persons who 'work' for another company are truly employees of the HUBZone SBC. The totality of circumstances language set forth in the HUBZone regulations can also be found in SBA's size regulations. When determining the size of a particular concern under an employee-based size standard (i.e., the number of employees that the concern has), SBA's size regulations require that the Agency count all individuals employed by the concern, including those employed on an "other basis." 13 CFR 121.106(a). Like the HUBZone regulations, the size regulations also direct SBA to consider the totality of the circumstances when determining whether certain individuals are to be considered employees of the concern in question. Id.

The totality of the circumstances language first appeared in SBA Size Policy Statement No. 1, published in the Federal Register on February 20, 1986, 51 FR 6099. Size Policy Statement No. 1 gave notice of SBA's intended application and interpretation of the definition of number of employees. Id. According to Size Policy Statement No. 1, the intended application of the regulation was to broaden SBA's authority to find that certain individuals be considered employees of the concern on an 'other basis.' Id. Specifically, SBA stated its concern that administrative precedent had interpreted the size regulation in an overly mechanical way and therefore could subject SBA's size determinations to abuse.

72 Fed. Reg. 3750, 3752-3753 (Jan. 26, 2007) (emphasis added).

In determining whether a particular concern should be viewed as employing certain individuals on an “other basis,” Size Policy Statement No. 1 directs that the SBA “should consider any information or data relevant to the question of whether an employer is deriving the usual benefits incident to employment of such individuals, and the circumstances under which the situation came to exist.” 51 Fed. Reg. 6099. The Size Policy Statement again directs the SBA to consider the “totality of the circumstance,” including the eleven factors (e.g., who engages/selects employee, pays employee, dismisses employee, controls employee and supervises them, etc.). Id. at 6100-6101. The presence of one or more of the factors in a particular case “may but will not necessarily support a finding that the employees should be attributed to the business whose size is an issue.” Id. at 6101. The SBA explained that there may be legitimate business reasons in some cases for a company’s employment practices and the SBA’s policy is not meant to penalize a business from engaging in legitimate business arrangements. Id.

Thus, SBA utilizes the principles enunciated above concerning the totality of circumstances and the need to review all factors, when determining whether a person should be counted as an employee of a HUBZone SBC. The crux of this totality of circumstances test is to preserve the integrity of the HUBZone program and prevent certain employment practices that circumvent the HUBZone Act and implementing regulations. The purpose of the HUBZone program is to “increase employment opportunities, investment, and economic development in” historically underutilized business zones. 13 C.F.R. § 126.100. One way the HUBZone program increases employment opportunities in HUBZones is with the 35% HUBZone residency and principal office requirements. The SBA’s definition of the term “employee” for HUBZone program purposes is designed to ensure that the purposes of the HUBZone program are met. Consequently, the SBA promulgated regulations to allow it to look at the totality of circumstances of each individual case. It would not serve the purpose of the HUBZone program to condone the use of certain employment practices that allow a business to create the facial appearance of being eligible for the HUBZone program.

As a result, in making this determination, the SBA will first look to see whether: (1) the HUBZone applicant/HUBZone SBC is in fact sharing employees with another business concern; (2) there is no clear line of fracture between the HUBZone applicant/HUBZone SBC and the other company/affiliate; and/or (3) there is evidence of subterfuge. In fact, SBA’s webpage explains the following and further elaborates on this issue as follows:

**Does SBA combine employees from affiliated companies when determining if there are enough living in a HUBZone?**

Answer:

It depends. SBA uses the totality of circumstances test to determine whether an individual is an employee of the HUBZone SBC or applicant.

For example, SBA has seen the situation where Company A is not qualified for the program. The owners of Company A set up Company B, with a few employees, most or all of whom are HUBZone residents. Company B lists a



Based upon all of this information, I believe that the three companies are clearly acting as one. In other words, based upon all of the above (and no one single factor) there is no clear line of fracture between [REDACTED] [REDACTED] and [REDACTED]. Rather, the companies are so intertwined and intermingled that the employees of one must be considered employees of the other for HUBZone program purposes. To find otherwise would allow a company to circumvent the program's requirements. In addition, the companies share common ownership and common management, and therefore the two individuals, Mr. [REDACTED] and Ms. [REDACTED] clearly can control all of the individuals of all three companies, including hiring and firing such individuals. Therefore, based upon all of the above and the totality of circumstances, I believe that the employees of [REDACTED] and [REDACTED] must be treated as employees of [REDACTED] for HUBZone program purposes.

According to the payroll records and other documents provided covering the date of offer, including quarterly unemployment reports, [REDACTED] and its affiliates had 30 employees who worked at least 40 hours in a month. At least 11 of [REDACTED]'s and its affiliate's employees must have resided in a qualified HUBZone ( $30 * 35\% = 10.5$ , rounded up to 11<sup>1</sup>) to meet the 35% HUBZone residency requirement. Of these 30 employees, the documentation provided, including driver's licenses, evidence that 15 employees resided in a qualified HUBZone. Therefore, [REDACTED] met the 35% residency requirement at the time of offer.<sup>2</sup>

According to payroll records and other documents provided covering the present time, including quarterly unemployment reports, [REDACTED] and its affiliates have 30 employees who worked at least 40 hours in a month. At least 11 of [REDACTED]'s and its affiliate's employees must have resided in a qualified HUBZone ( $30 * 35\% = 10.5$ , rounded up to 11) to meet the 35 % HUBZone residency requirement. Of these 30 employees, the documentation provided, including driver's licenses, evidence that 15 employees reside in a qualified HUBZone. Therefore, [REDACTED] met the 35 % residency requirement at the present time.<sup>3</sup>

In sum, I find that [REDACTED] was in compliance with the 35 % HUBZone residency requirement at the time of offer and at the present time. Consequently, I am denying this protest allegation.

### 3. Appeal Rights

[REDACTED] the protester, or the contracting officer may appeal this decision pursuant to

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<sup>1</sup> "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).

<sup>2</sup> I note that [REDACTED] on its own also meets the 35% HUBZone residency requirement. According to the payroll records and other documents provided covering the date of offer, including quarterly unemployment reports, [REDACTED] had 11 employees who worked at least 40 hours in a month. At least 4 of [REDACTED]'s employees must have resided in a qualified HUBZone ( $11 * 35\% = 3.8$ , rounded up to 4) to meet the 35% HUBZone residency requirement. Of these 11 employees, the documentation provided, including driver's licenses, evidence that 6 employees resided in a qualified HUBZone.

<sup>3</sup> I note that [REDACTED] on its own also meets the 35% HUBZone residency requirement. According to the payroll records and other documents provided, including quarterly unemployment reports, [REDACTED] had 11 employees who work at least 40 hours a month. At least 4 of [REDACTED]'s employees must reside in a qualified HUBZone ( $11 * 35\% = 3.8$ , rounded up to 4) to meet the 35% HUBZone residency requirement. Of these 11 employees, the documentation provided, including driver's licenses, evidence that 6 employees reside in a qualified HUBZone.

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](mailto: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.

#### 4. 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](http://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.

#### 5. 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](mailto: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](mailto:hzprotests@sba.gov).

Sincerely,

Mariana Pardo  
Director, HUBZone Program

cc (via email or fax):

[REDACTED]

[REDACTED]