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

RIN 3245–AF13

HUBZone Program

AGENCY: Small Business Administration.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The U.S. Small Business Administration (SBA) is seeking comments on an issue involving the Historically Underutilized Business Zone (HUBZone) Program and agricultural commodities purchased by the U.S. Department of Agriculture (USDA). According to the Small Business Act, in the case of a contract for the procurement by the USDA of agricultural commodities, a qualified HUBZone Small Business Concern (SBC) may not purchase the commodity from a subcontractor if the subcontractor will supply the commodity in substantially the final form in which it is to be supplied to the Government. The SBA is seeking comments on how to define ''substantially the final form'' with respect to this statutory requirement.

In addition, on January 28, 2002, the SBA proposed amendments to its regulations that implement the HUBZone Program. SBA believes that one issue in the proposed rule merits further public comment. This issue, which is addressed in this Advance Notice of Proposed Rule Making (ANPRM), relates to a provision in the proposed regulation that defined the term ''employee.''

This ANPRM and request for comments are intended to stimulate dialogue on these two issues.

DATES: All interested parties are invited to submit written comments. Comments must be received on or before July 12, 2004.

ADDRESSES: Mail written comments to Michael P. McHale, Associate Administrator for the HUBZone Program (AA/HUB), 409 3rd Street, SW., Washington, DC 20416, via facsimile (202) 205–7167, or submit them via e-mail to *hubzone@sba.gov.* You may also submit comments electronically to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Michael P. McHale, AA/HUB, (202) 205–8885 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, Public Law 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).

On January 28, 2002, the U.S. Small Business Administration (SBA) published a proposed rule (67 FR 8739) to address amendments to the HUBZone Act made by the Small Business Reauthorization Act of 2000 (Reauthorization Act). Those amendments included provisions affecting the eligibility requirements for small business concerns owned by Native American Tribal Governments and Community Development Corporations, and the addition of new HUBZone areas called redesignated areas. The proposed rule addressed these statutory amendments, clarified several regulations, and made some technical changes, including changes to Web site addresses.

The proposed rule also addressed the statutory amendments made by the Reauthorization Act regarding agricultural commodities purchased by the U.S. Department of Agriculture (USDA). The amendment provides that, in connection with a USDA HUBZone procurement of agricultural commodities, or an unrestricted procurement for such commodities in which a qualified HUBZone SBC seeks a price evaluation preference, a qualified HUBZone SBC prime contractor may not purchase a commodity from a subcontractor if the subcontractor will supply the commodity in substantially the final form in which it is to be supplied to the Government. 15 U.S.C. 632(p)(5)(A)(i)(III)(cc). The Reauthorization Act defines ''agricultural commodity'' as having the same meaning as in section 102 of the Agricultural Trade Act of 1978 (7 U.S.C. 5602). According to 7 U.S.C. 5602, an ''agricultural commodity'' means any agricultural commodity, food, feed, fiber, or livestock (including livestock and insects), and any product thereof.

These statutory provisions were intended to address a perceived inequity that could result due to application of the HUBZone price evaluation preference. Because offers for commodities tend to fall within a narrow range of prices, application of the HUBZone 10% price evaluation preference could create a windfall for a small group of HUBZone SBCs that could, after contract award, simply subcontract to purchase the commodity being procured and sell the commodity to the Government at inflated or other than fair and reasonable prices. Congress believed that this scenario is more problematic when the USDA purchases raw products, as opposed to processed ones. With processed commodities, other variables come into play that can increase the range of costs and hence the range of offers, as well as the need to subcontract.

Thus, a qualified HUBZone SBC prime contractor that is awarded a HUBZone contract to supply commodities to the USDA may subcontract unless the subcontractor or vendor supplies the commodity in ''substantially the final form in which it is to be supplied to the Government.'' In other words, the qualified HUBZone SBC may subcontract the requirement, but the HUBZone SBC is expected to ''process'' or somehow change the commodity in some way, rather than merely acting as a pass-through.

SBA is seeking comments addressing the amount or level of processing necessary to satisfy the requirement that the subcontracted product not be in substantially the same form as that supplied to the Government. Specifically, SBA seeks comments relating to whether cleaning, blending, sorting/sizing or bagging a commodity, or any combination of these processes, results in the changed commodity that is contemplated by the statute.

For example, let us assume that the USDA has a requirement for shelled peanuts and a qualified HUBZone SBC bids on the requirement. Which, if any, of the following processes if performed by the HUBZone SBC would sufficiently change the commodity so that it was not in substantially the final form in which

it is to be supplied to the Government: (1) Bagging already cleaned and shelled peanuts; (2) cleaning, sorting and bagging already shelled peanuts; and (3) shelling, cleaning, sorting and bagging peanuts?

In addition, assume that the qualified HUBZone SBC had received a shipment of shelled and bagged peanuts several months ago, before submitting a bid on the USDA's requirement, and that this shipment was now simply part of the qualified HUBZone SBC's inventory. Would a contract to that qualified HUBZone SBC violate the statute?

Similarly, should the blending of grains or the sizing of peas, beans and lentils be considered sufficient processes by themselves to receive a HUBZone price evaluation preference, or would they have to be in conjunction with other processes (*e.g.*, bagging)?

SBA notes that the HUBZone program is designed to create jobs and promote economic development in distressed areas through small businesses. Where a HUBZone firm makes a capital investment in equipment (*e.g.*, bagging equipment) and hires five to ten people to run that equipment, the underlying purposes of the program are being met. The question becomes whether capital investment and job creation generally should have any effect on whether the HUBZone price evaluation preference should be applied.

SBA invites comments on this issue regarding agricultural commodities, including: (1) Comments specifically addressing the examples set forth above; (2) other examples pertinent to the issue; (3) comments on definitions for ''substantially the final form in which it is to be supplied to the Government;'' (4) any other comments relating to the purchase of commodities by the USDA and the HUBZone program; (5) whether SBA needs to define or address the difference between producer and manufacturer as it relates to the purchase of agricultural commodities; and (6) whether SBA should redefine the term subcontract as it relates to agricultural commodities, and if so, how.

In the same proposed rule, SBA also proposed to amend the definition of the term ''employee.'' Currently, the regulations provide that an ''employee'' of a concern includes ''full-time equivalents.'' SBA proposed removing the provision concerning ''full-time equivalents'' because SBA believes it is confusing. Instead, SBA proposed a definition that would allow persons employed on a full-time or part-time basis to be considered employees of the concern. The rule also stated that SBA would use a ''totality of circumstances'' analysis to determine whether a person is an employee. The proposed definition is similar to the one used for size, set forth in part 121 of SBA's regulations.

Relatedly, SBA proposed allowing leased or temporary employees to be counted as employees of the concern for purposes of HUBZone eligibility. It is believed that such employees comprise approximately 2–5% of the U.S. work force. Further, small businesses employ approximately 40% of these types of workers. SBA believes that counting leased, temporary and part-time employees as employees for HUBZone eligibility would fulfill the statutory purpose and intent of the HUBZone Act by providing more job opportunities for HUBZone residents, albeit temporary or part-time.

The proposed definition of the term ''employee'' also stated that volunteers would not be counted. The proposed rule defined a volunteer as a person who receives no compensation for work performed. SBA intended the term compensation to be read broadly and to encompass more than wages. Thus, a person who receives food, housing, or other non-monetary compensation in exchange for work performed would not be considered a volunteer under that proposed regulation. SBA believes that allowing volunteers to be counted as employees would not fulfill the purpose of the HUBZone Act—job creation and economic growth in underutilized communities.

SBA received three comments expressing concerns over the proposed definition of employee. One commenter believed the proposed rule could cause a large-scale shift of workers from full-time equivalent to leased or part-time status with reduced benefits. Another commenter asserted that this change would weaken the nexus between participating firms and the HUBZone areas. In addition, one commenter expressed concern that companies could intentionally exploit the change and hire temporary employees for the sole purpose of obtaining HUBZone certification, or to receive HUBZone contracts. One commenter recommended that, to prevent such abuse, the definition of employee should include a requirement that a certain percentage of HUBZone employees must be paid the same as, or have the same classifications as, non-HUBZone employees. Another commenter believed that an individual should be required to work a certain number of hours before he or she is counted as an employee for the purpose of the 35% HUBZone residency requirement, registering a concern that a company could circumvent the 35% requirement by hiring various HUBZone residents to work one, two or some other number of minimum hours per week. We believe that the approach suggested by this commenter makes sense, and ask for comments as to what minimum number of hours an employee should work to count in determining compliance with the 35% residency requirement.

One commenter stated that using a totality of circumstances test to determine whether part-time employees are bona fide employees and permitting non-monetary compensation to be relevant in the calculation invites arbitrariness. Another commenter stated that the definition of volunteer was too narrow.

Meanwhile, several commenters believed that the proposed rule would create more job opportunities for HUBZone residents and agreed that leased and temporary employees represent a substantial portion of today's workforce. One commenter alleged that several firms are using the current exemption for leased and temporary employees to qualify for the program by claiming only a few employees, when in reality, they have many employees, all of whom are leased and very few of whom live in HUBZone. One commenter supported the proposed rule, but suggested that SBA expand the definition to allow employees of co-employer arrangements to be treated as employees of a HUBZone SBC.

In light of the foregoing, SBA believes it needs further input from the public on the definition of the term ''employee'' for HUBZone Program purposes. Specifically, SBA encourages comments addressing: (1) Why part-time employees should not be included as ''employees;'' (2) the impact of including leased and temporary employees as ''employees;'' (3) whether SBCs understand and properly calculate full-time equivalents; (4) whether employees from co-employer arrangements should be treated as ''employees;'' and (5) any other issue relevant to the definition of ''employee'' for HUBZone program purposes.

Comments on any other aspect of the HUBZone Program are also welcome. SBA reminds commenters that all submissions by commenters are available to the public upon request.

Dated: May 6, 2004.

Hector V. Barreto,

Administrator.

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