



Changes to SBA's HUBZone Program Are Here: Their Impact on Your Business Goals

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Jon Williams has nearly 20 years of experience advising contractors on a wide range of government contracting matters and Federal Acquisition Regulation compliance, including the federal procurement programs for small businesses (i.e., the 8(a), HUBZone, WOSB, and SDVOSB programs).

Mr. Williams represents contractors in bid protests, size protests and appeals, and related administrative and court proceedings. He assists large and small contractors in navigating SBA audits and investigations, including subcontracting plan compliance reviews, IG investigations, and suspension and debarment proceedings. He regularly helps contractors to establish teaming, subcontract, joint venture, and mentor-protégé relationships. Additionally, he counsels contractors on cure notice responses, requests for equitable adjustment, claims, and disputes on government contracts.

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Ms. Flood counsels and advises clients on matters including contract negotiation issues; small business procurement matters; Small Business Subcontracting Plan compliance; issues related to the GSA FSS program; and Service Contract Act compliance issues. She also drafts and reviews teaming agreements, subcontracts, joint venture agreements, mentor-protégé agreements, non-disclosure agreements, and contractor team arrangements.

Overview

- Major HUBZone rule changes
 - SBA's intent behind the changes
 - Changes to key definitions and HUBZone program eligibility requirements
 - Changes to the application process and ongoing certification requirements
- New compliance strategies
- Questions?

Major Overhaul of SBA's HUBZone Rules

- First comprehensive review of SBA's HUBZone rules in the 20 years of the program
- Proposed rule issued October 2018; Final rule published on November 26, 2019 (see 84 Fed. Reg. 65222)
- Rule changes take effect on **December 26, 2019**
- HUBZone firms need to update their compliance strategies for 2020 and beyond based on the new rules

Why SBA Revised the HUBZone Rules

- SBA recognized ambiguities and difficulties under the current rules, and desired to make the HUBZone rules “more efficient and effective”
 - New rules are supposed to be easier for HUBZone firms to understand, and make compliance less burdensome
 - SBA hopes the new rules will make the program more attractive to contractors and procuring agencies
- SBA believes it is unrealistic to expect a HUBZone firm or its employees to relocate in order to maintain the firm’s HUBZone status if the firm’s or its employees’ original HUBZone area later loses its HUBZone designation

Key Changes

- Annual recertification; no more requirement to be eligible on the bid and award date for each HUBZone contract
- Employees may continue to qualify as HUBZone employees even when they no longer live in a HUBZone, if certain requirements are met
- HUBZone employees must reside in a HUBZone for at least 180 days prior to the certification date – no wiggle room anymore
- Principal office may continue to qualify as HUBZone for at least 10 years after the initial certification, regardless of the HUBZone status of the area in which it is located, if certain requirements are met
- And much more!

Definition of “Attempt to Maintain Compliance”

- For certified firms with current HUBZone contracts, HUBZone employee percentage “floor” is 20%
 - As long as you stay above 20% during performance of a HUBZone contract, and are making efforts to hire more HUBZone employees, you will maintain HUBZone compliance
 - Falling below 20% is a failure of attempting to maintain compliance, and SBA may decertify the firm as a result
 - Certified HUBZone firms have an affirmative duty to notify SBA if they fall below 20% HUBZone employees during performance of a HUBZone contract
- No change: you cannot use the “attempt to maintain compliance” exception if you are not performing any HUBZone contracts

Definition of “Employee”

- No change to the hours requirement: an individual must work at least 40 hours per month to qualify as an employee
 - SBA had considered changing this to 20 hours per week, but received pushback on this and agreed that it would hinder efforts to hire and retain HUBZone employees
- To determine employee status, SBA will look to the firm’s payroll records during the 4-week period immediately prior to the relevant certification date
- No change: SBA will count temporary and leased employees, individuals obtained through a union agreement, and those employed through a PEO agreement if they otherwise meet the definition of employee

“Employee” Definition, Cont’d

- Compensation is key (except for owners)
 - Individuals who do not receive compensation, such as volunteers, or who receive deferred compensation, are not considered employees
 - There must be a “present economic benefit” given to the employee
 - In-kind compensation like food and housing will count, as long as it has a demonstrable financial value to the individual and is compliant with relevant laws – you need an agreement to make this clear
 - All owners who work at least 40 hours per month are considered employees, even if not compensated
 - If a sole owner works less than 40 hours during the relevant 4-week period but has not hired someone else to direct the company, SBA will treat the sole owner as an employee

“Employee” Definition, Cont’d

- 1099s generally are not considered employees
 - However, if the 1099 individual would be considered an employee for size purposes under SBA’s Size Policy Statement No. 1, the individual will also be considered an employee for HUBZone purposes. Test factors include:
 - Did the company engage and select the employees?
 - Does the company pay the employees’ wages and/or withhold employment taxes and provide benefits?
 - Does the company have the power to dismiss the employees?
 - Does the company have the power to control and supervise the employees’ performance of their duties?
 - SBA: does not make sense to treat an individual as an employee for size purposes, but not for HUBZone purposes
- SBA will allow firms to obtain employees from third parties that provide HUBZone employees to multiple firms

Definition of “Principal Office”

- No change: when determining a firm’s principal office, SBA will count all of a firm’s employees who work out of an office, but not employees who work on job sites
 - SBA clarified that the job site exclusion applies to firms in the construction and services industries
- You must demonstrate you conduct business at the principal office location
 - Simply owning or leasing a building but not conducting any business does not fulfill purpose of the program

Definition of “Principal Office,” Cont’d

- New rule addresses when employees work in multiple offices
 - Key is to determine where each employee spends at least 50% of their time working
 - If an individual spends more than 50% of their time working on a job site, and the firm is in construction or services, the individual is treated as a job site employee
 - If an individual spends 51% or more of their time working from a particular office, the individual is treated as an office employee for that office, even if the individual spends up to 49% of their time working at a second office location
 - Also have to consider where the owner(s) work

Definition of “Reside”

- To determine if an employee lives in a HUBZone, SBA looks first to the individual’s driver’s license or voter registration card to determine where he or she lives, then deeds or leases, or utility bills
- Employee must live in a HUBZone for 180 days prior to the certification date
 - **Important change:** The 180-day residency requirement is not new, but SBA previously permitted flexibility if you could demonstrate the employee intended to remain living in a HUBZone; under the new rule, this flexibility has been removed so each employee must satisfy the 180-day requirement
- You can count U.S. resident working overseas if employee is paying rent or owns a home in a HUBZone

HUBZone Maps Remain Frozen

- For Anna, Elsa, and all HUBZone firms located in redesignated HUBZone areas in existence on December 12, 2017, the HUBZone maps are frozen until December 31, 2021
 - This is an extension from December 31, 2020
 - SBA's goal is to ensure the HUBZone maps have been updated based on the 2020 census data

Key Changes in the HUBZone Eligibility Requirements

- Size
 - Ambiguity in current rules regarding whether a firm's outgrowing of the size standard for its primary NAICS code required decertification
 - New rules clarify that firm will maintain HUBZone eligibility so long as it is small in at least one of the NAICS codes in which it operates
- 35% HUBZone Employee Calculation
 - Currently, if the 35% calculation results in a fraction, you always have to round up (i.e., 35% of 6 employees equals 2.1, so you would need 3 HUBZone employees, or 50%)
 - Under the new rule, you can round to the nearest whole number (i.e., in the above example, you would only need 2 HUBZone employees)

Big Change for Principal Office Eligibility

- If a firm owns its principal office location, or makes a long-term investment (e.g., a lease of at least 10 years), in a HUBZone area, that principal office location will remain HUBZone-eligible for no less than 10 years
 - This provides greater certainty to firms looking to move into a HUBZone and apply to the program without having to worry if the area will lose HUBZone status a few years later
 - SBA recognizes that firms should not be forced to move their location because their HUBZone location improves and loses HUBZone status

Big Change for Principal Office Eligibility, Cont'd

- Caveats
 - New rule states that this applies at the time of initial HUBZone certification, so it is unclear if the new rule would apply retroactively to firms already in the HUBZone program, or to significant long-term investments made for the first time prior to an annual recertification
 - Does not apply to leases of office space that are shared with one or more other concerns or individuals, or to other co-working arrangements
 - SBA does not believe “virtual offices” or co-working arrangements rise to the level of significant investment in a HUBZone area
 - Does not apply to subleases, either

Big Change for Counting HUBZone Employees

- A HUBZone firm can continue counting an employee as a HUBZone employee, even after the person no longer lives in a HUBZone, as long as the employee:
 - Lives in HUBZone for at least 180 days prior to the firm's initial or annual certification date;
 - Lives in a HUBZone for at least 180 days after that certification; and
 - Continuously works for the HUBZone firm
- This rule will apply retroactively, so it will apply to any of your current employees who meet all three requirements
 - You must have the necessary supporting documentation

Big Change for Counting HUBZone Employees, Cont'd

- Caveats
 - If there is any break in the employee's employment with the HUBZone firm, the employee would have to re-qualify as a HUBZone employee according to the three criteria on the last slide
 - The HUBZone firm must maintain records of the employee's original address, and continued/uninterrupted employment, for the entire time the firm is in the HUBZone program

Impact of Affiliation

- No change: HUBZone firms may have affiliates, and affiliation does not automatically impact HUBZone status
- Where the HUBZone firm and its affiliate are intertwined and acting as one, SBA will count the employees together in determining if the HUBZone firm meets the 35% and principal office requirements
- SBA will look at totality of the circumstances
 - Employees of affiliates are likely to be counted together with the HUBZone firm's employees when there is no clear line of fracture between the companies, employees are in fact shared, or there is evidence of intentional subterfuge
 - SBA will not count employees of affiliate for HUBZone purposes if they would not be treated as affiliates for size purposes

More on Clear Line of Fracture

- To determine clear line of fracture, SBA will assess if the firms:
 - Operate in same or similar line of business
 - Operate in the same geographic location
 - Share office space/equipment
 - Share any employees
 - Share or have similar websites or email addresses
 - Share phones and faxes
 - Have entered into agreements together like JVs, teaming agreements, subcontracts, and leases, or otherwise use each other's services
 - Share customers
 - Have similar names
 - Have key employees participating in each other's business decisions
 - Have hired each other's former employees

Key Clarification for Parent/Sister/Subsidiary Entities

- Since May 2018, SBA rules have permitted HUBZone firms to be indirectly owned by another entity, as long as the ultimate ownership is at least 51% by U.S. citizens
 - It has been unclear how SBA will determine whether to combine employees of parent and subsidiary or sister entities when determining an entity-owned firm's HUBZone compliance
- New rule clarifies:
 - Minimal business activity between affiliates will not result in combining of employees
 - Use of common back office or administrative services between parent, subsidiary, and/or sister concerns will not result in an affiliate's employees being counted with the HUBZone firm

Initial Certification Process

- As of January 1, 2020, applications should be processed within 60 days
- Must immediately notify SBA of material changes impacting a pending application
- Owner or officer must make representations
- SBA abandoned proposed reconsideration after application denials because you can submit a new application in 90 days
 - However, if SBA finds you are ineligible during your application or an eligibility review while you are in the program, you get 30 days to provide documentation showing you are in fact eligible

Big Change to Annual Recertification

- Old rule:
 - Must be HUBZone eligible on the bid and award dates for every HUBZone contract you pursue
 - Recertification of HUBZone status with full document review every 3 years
- New rule:
 - Annual recertification without full document review
 - Full document review every 3 years
 - Annual certification means you are eligible to bid on/win any HUBZone contracts throughout the upcoming year
 - HUBZone eligibility is not required as of the bid and award dates on HUBZone contracts; eligibility for contracts relates back to your most recent annual certification date

Big Change to Annual Recertification, Cont'd

- 20% vs. 35%
 - If you are performing on a HUBZone contract at your annual recertification date, you remain eligible as long as at least 20% of your employees live in a HUBZone and you satisfy the other eligibility requirements
 - If you are not performing on a HUBZone contract at your annual recertification date, you must have at least 35% of your employees living in a HUBZone and meet the other eligibility requirements
- New employees as of the annual recertification date
 - If you add an employee during your program year, that person will count as a HUBZone employee at your next annual recertification date if they lived in a HUBZone for at least 180 days prior to your next recertification date
 - The same employee would continue to count as a HUBZone employee for as long as he/she works for you if he/she continued to live in a HUBZone for 180 days after your next annual recertification date

Big Change to Annual Recertification, Cont'd

- Must notify SBA if firm acquires, is acquired by, or merges with another business or fails to attempt to maintain the minimum HUBZone residency requirement when performing HUBZone contract
- Protests will be decided based on eligibility as of most recent certification to SBA
- How does annual recertification apply to HUBZone JVs?

HUBZone Representations for IDIQ Contracts

- HUBZone set-aside IDIQs
 - HUBZone firm must maintain at least 20% HUBZone employees for the life of the entire IDIQ
 - If you are HUBZone eligible at time of getting HUBZone IDIQ, you are eligible for all Task Orders (“TOs”) even if you end up being decertified later and some TOs are issued after decertification
 - Unless CO explicitly requires HUBZone recertification for the TO
- Non-HUBZone set-aside IDIQs
 - If a HUBZone TO is issued under a non-HUBZone IDIQ, the HUBZone firm must maintain 20% HUBZone employees only for the TO
 - HUBZone firm must be HUBZone eligible at time of bid and award for the TO – except for BPAs and orders under the Federal Supply Schedule

Quick Compliance Tips

- For all HUBZone employees, compile and maintain a compliance file
- Find out and document when your HUBZone employees first started living in a HUBZone
- Research long-term investment options in qualified HUBZone areas
- If you have multiple offices and/or job sites, track where each employee spends greater than 50% of his/her time working
- Plan far enough in advance of your annual certification dates
- Consider impacts on HUBZone status before mergers and acquisitions
- Call us!

Questions?



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