

CHRISTOPHER S. BOND, MISSOURI, CHAIRMAN

CONRAD R. BURNS, MONTANA
PAUL COVERDELL, GEORGIA
ROBERT F. BENNETT, UTAH
OLYMPIA J. SNOWE, MAINE
MICHAEL ENZI, WYOMING
PETER G. FITZGERALD, ILLINOIS
MIKE CRAPO, IDAHO
GEORGE V. VOINOVICH, OHIO
SPENCER ABRAHAM, MICHIGAN

JOHN F. KERRY, MASSACHUSETTS
CARL LEVIN, MICHIGAN
TOM HARKIN, IOWA
JOSEPH I. LIEBERMAN, CONNECTICUT
PAUL D. WELLSTONE, MINNESOTA
MAX CLELAND, GEORGIA
MARY LANDRIEU, LOUISIANA
JOHN EDWARDS, NORTH CAROLINA

United States Senate

COMMITTEE ON SMALL BUSINESS
WASHINGTON, DC 20510-6350

February 16, 2000

The Honorable Aida Alvarez
Administrator, Small Business Administration
409 Third Street SW
Washington, DC 20416

Dear Administrator Alvarez:

Thank you for all you have done to implement the HUBZone program, thus improving job opportunities and economic growth in our nation's most intransigent areas of poverty and unemployment. As SBA considers corrections to the existing HUBZone rules to reflect lessons learned during the past year of implementation, I call your attention to two important issues. One of these we discussed in passing during our meeting last Friday, but I would like to reiterate it in more detail here.

First, my office hears frequently that the HUBZone program is unduly restricted due to the affiliation requirement at 13 CFR § 126.204. This provision limits HUBZone participation to firms with no affiliates other than women-owned businesses, 8(a) participants, or other HUBZone firms. In practice, this provision has excluded small businesses that the HUBZone law intended to include.

For example, an otherwise-qualified firm whose building is owned by an affiliated, but ineligible, real estate holding company for tax reasons would be forced to decide whether to give up its known tax advantages for the possibility of receiving a Government contract through the HUBZone program. Most businesses will not consider surrendering a certain benefit in return for a possible one. This provision makes HUBZone participation unattractive to such firms.

The general affiliation rules at § 121.103 are more than adequate to prevent the abuse of the HUBZone program by large firms. The taxpayer-financed benefits of the HUBZone program, like other programs in the Small Business Act, are intended for small firms only. Large businesses setting up small fronts, for the purpose of milking the small business program, would be an abuse. To this end, § 3(a)(2) of the Small Business Act vests the Administrator with authority to establish size standards, and the affiliation rules have been an outgrowth of that authority--to apply those size standards to an entire enterprise that may on paper be divided into small units but which acts as a single whole.

The rulemaking authority at § 3(a)(2) does not, however, vest the Administrator with power to exclude eligible small businesses from the HUBZone program by limiting participation to favored types of small business affiliates, as long as the entire enterprise is small. I believe the affiliation restriction at 13 CFR § 126.204 is not authorized by the Small Business Act and

should be struck. I encourage you to include such a change in your revisions of the HUBZone regulations.

Second, as I mentioned at our meeting on Friday, I have lately been informed that SBA is considering adopting an order of preference that would subordinate the HUBZone program to the 8(a) program. I am absolutely opposed to such a proposal. It is contrary to law and should not proceed.

The current SBA rules, in fact, are a correct statement of the law and of the agreement we reached, during Congressional consideration of the HUBZone bill, to hold 8(a) harmless relative to the HUBZone program. This approach ensures that the 8(a) and HUBZone programs operate in parallel, with neither having precedence over the other--the sole exception being firms that qualify for both 8(a) and HUBZones. To implement this, 13 CFR § 126.607(b) states that a contracting officer shall identify both qualified HUBZone 8(a) concerns as well as other 8(a) concerns. The second sentence of that subsection, which specifies the actual preference to be awarded, gives a preference only for HUBZone 8(a) firms. Identifying "other 8(a) concerns" serves only to provide the contracting officer with information in the exercise of his or her discretion in deciding how to handle sole source contracts, as discussed below--it does not impose a mandatory preference.

By §§ 126.605 and 126.606, SBA's rules also ensured that the HUBZone program not take existing 8(a) contracts away without giving SBA the opportunity to review the change. This provision ensures only that the HUBZone program and the 8(a) program will be allowed to function concurrently, with one program not interfering with the other. It does not dictate any preference (either for HUBZones or for 8(a)) with respect to new contracting opportunities.

As further illustration that this was our agreement on these issues, I call your attention to SBA's own actions on its originally proposed rules for § 126.609, which would have created a preference for 8(a) sole source contracts over HUBZone sole source contracts. This approach was dropped in the final rule version of § 126.609. SBA explained in its "Section-by-Section" analysis accompanying the final rule that "the procurement methods a contracting officer uses in other respects [other than the preference for HUBZone sole source contracts over the general small business set-asides included in the final § 126.609] should be left to the contracting officer" (63 Federal Register 31903, June 11, 1998). SBA could not provide otherwise, since this position is clearly set out in the statutory language passed by the Congress.

Section 602(b)(1) of the HUBZone Act of 1997 rewrote Section 31 of the Small Business Act to state that "Notwithstanding any other provision of law. . . a contracting officer may award sole source contracts" through the HUBZone program, under certain conditions; further, the contracting officer "shall" set-aside a contract opportunity for HUBZones if certain additional conditions are met. Attempts to impose a hierarchy in favor of 8(a) are in violation of the plain

The Honorable Aida Alvarez
Page Three

language of the statute, by limiting the contracting officer's discretion with respect to sole source contracts and by undermining the mandatory language with respect to HUBZone set-asides. If SBA were now to abandon this position and adopt a preference--either for HUBZones or for 8(a)--I would consider this a breach of the agreement we had reached on this issue and contrary to the legislative language endorsed on all sides to implement that agreement.

Accordingly, any preference to elevate either the HUBZone program or the 8(a) program over the other is unacceptable and contrary to law and to our agreement. The proposal exceeds the authority vested in the Administrator by the Small Business Act and the HUBZone Act, and attempts to create such a preference should be abandoned.

If you have questions about this letter, please feel free to contact Cordell Smith of the Small Business Committee staff on (202)224-

Sincerely,



Christopher S. Bond
Chairman

CSB:ces