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United States Senate

COMMITTEE ON SMALL BUSINESS & ENTREPRENEURSHIP
WASHINGTON, DC 20510–6350

March 20, 2002

The Honorable Hector Barreto
Administrator
U.S. Small Business Administration
409 3rd Street, S.W.
Washington, D.C. 20416

Mr. Michael McHale
Associate Administrator
U.S. Small Business Administration
409 3rd Street, S.W.
Washington, D.C. 20416

Dear Administrator Barreto and Mr. McHale:

I am writing in my capacity as Chairman of the U.S. Senate Committee on Small Business and Entrepreneurship to provide comments on the Small Business Administration's (SBA) proposal to amend its regulations for the Historically Underutilized Business Zone Program (HUBZone Program), which was published in the Federal Register on January 28, 2002.

Having served as the Ranking Member of the Senate Committee on Small Business in 1997, I am highly familiar with Congressional intent regarding passage of the HUBZone legislation. In fact, I negotiated the agreement to establish "parity" or "equality" between the HUBZone program and the 8(a) Business Development (BD) program with then-Committee Chairman Senator Kit Bond. The Committee Report accompanying the Small Business Reauthorization Act of 1997 (Senate Report 105-62), which included the HUBZone authorizing legislation, clearly states that I introduced amendments, which were accepted by the Committee, to change the HUBZone legislation from one of HUBZone priority over the 8(a)BD program to one of equality with the 8(a)BD program. I continue to view both the HUBZone and 8(a)BD programs as critical tools to help serve minority communities, as well as help create economic opportunities in underutilized areas.

That being said, I do have some serious concerns with the proposed rule, in that I do not believe it establishes a proper balance between the 8(a)BD and HUBZone programs. In addition, I feel that the proposed rule, in some instances, goes against Congressional intent in passing the HUBZone legislation.

Specifically, I am greatly troubled by the lack of a grandfather provision to keep current 8(a)BD contracts within the 8(a)BD program and the lack of any statement in the proposed rule to protect the 8(a)BD program. The section permitting a contracting officer to request the release of an 8(a)BD requirement under certain circumstances should be withdrawn and language specifically protecting 8(a)BD requirements and contracts should be inserted. Congressional intent in establishing the HUBZone program was never to remove contracts from the 8(a)BD program, nor to create opportunities for HUBZone firms at the expense of 8(a)BD firms. Rather, the program was intended to bring non-8(a)BD contracts into the HUBZone program. HUBZone opportunities should come out of the larger Federal procurement universe, not the 8(a)BD program. By failing to include language in the HUBZone proposed rule to establish a grandfather clause for 8(a)BD contracts and language specifically protecting 8(a)BD firms, the proposed rule only serves to confuse contracting officers and undermine the intent of the HUBZone legislation.

I am also troubled by the proposed rule's language stating that a contracting officer should look to a Federal agency's HUBZone and 8(a)BD goals as a means of providing guidance for determining when a contract should be awarded to an 8(a)BD or a HUBZone firm. Since the Department of Defense (DoD), which is responsible for over 63 percent of Federal procurement spending has no 8(a)BD goal, the proposed rule could easily be interpreted to mean that HUBZone firms should always receive a priority at the DoD. In addition, there is no statutory governmentwide goal for the 8(a)BD program. I am not reassured in the least that the proposed rule also states that "other pertinent factors" should be considered after the contracting officer reviews the goals, as these pertinent factors clearly play a secondary role and are ill-defined in the proposed rule. I believe strongly that providing guidance to contracting officers that so heavily relies on a Federal agency's goal attainment in determining when a contract should go to an 8(a)BD or HUBZone firm is a direct violation of the parity amendments passed by the Senate Small Business Committee when it considered the HUBZone authorizing legislation. Given this, the SBA should remove the language referring to a Federal agency's goal as a determining factor in deciding between an 8(a)BD and HUBZone contracting vehicle and establish criteria for providing guidance to contracting offers that places the programs on a level playing field.

In addition, I am deeply disappointed that the SBA has chosen to remove the benefit known as the "super-priority," previously available to firms that have both 8(a)BD and HUBZone certification. The super-priority was intended to provide these dual-certified firms with an advantage when submitting offers on set-aside solicitations under the 8(a)BD and HUBZone programs. My understanding is that, despite being part of existing regulations, the super-priority was eliminated based solely an opinion from the SBA's Office of General Counsel. As a result, the proposed HUBZone rule makes no mention of the super-priority. I disagree with the SBA's Office of General Counsel on its interpretation of the HUBZone law, which has

resulted in the elimination of this important benefit available to dual-certified firms. I would urge the SBA to use its general regulatory authority to reinstate this important benefit under this rule.

Finally, I have grave concerns over the proposed rule's change to the definition of a HUBZone employee. Under the current rule, an employee is defined as a full-time-equivalent, which corresponds to congressional intent that the benefits available to a HUBZone firm are in place as a means to help create jobs in underutilized areas. The proposed rule would allow persons employed on a part-time basis to be considered employees of the concern, as well as temporary or leased personnel. In addition, the proposed rule correctly states that volunteers may not be considered personnel, but defines a volunteer so narrowly, as someone receiving no form of compensation, including food or housing, that nearly any volunteer in the traditional sense could be considered an employee, opening the program to potential fraud. The definition of an employee proposed by the SBA is so broad and so far from Congressional intent, it is conceivable that a small business concern would meet the employment requirements of the HUBZone legislation by providing morning doughnuts and coffee to office volunteers. The SBA had it correct in the original rule and should maintain the current definition of a HUBZone employee.

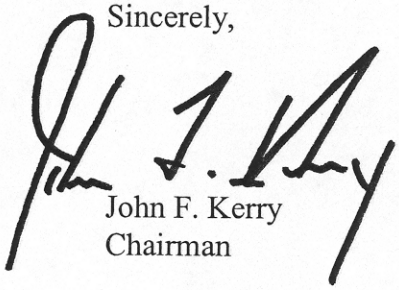
In addition to my concerns regarding the proposed rule, I am taking this opportunity to comment on the SBA's proposals regarding subcontracting requirements for general construction and specialty trade construction. I agree with the SBA's assessment that unless a HUBZone firm, or a combination of HUBZone firms, is performing at least 50 percent of a construction contract, the intent of the HUBZone legislation, to create jobs and investment in underutilized areas, would be thwarted. Therefore, I would support a rule change requiring a HUBZone firm, or a combination of HUBZone firms, to perform a minimum of 50 percent of all work on a general or specialized construction contract before the benefits of a the HUBZone program commence. I further support the SBA's proposal that, for general construction, a HUBZone prime contractor should complete a minimum of 15 percent of the contract, provided that at least 35 percent of the overall contract was subcontracted to one or more HUBZone firms, for a total of at least 50 percent of the contract being completed by HUBZone firms. Regarding a specialty trade construction contract, I agree with the SBA that for specialty trade construction, a HUBZone prime contractor should complete a minimum of 25 percent of the contract, provided that at least 25 percent of the overall contract was subcontracted to one or more HUBZone firms, for a total of at least 50 percent of the contract being completed by HUBZone firms.

Once again, as a supporter of the 8(a)BD and HUBZone programs, I view both as critical tools to help serve minority communities and help create economic opportunities in underutilized areas. While I support the underlying intent of the proposed rule to establish parity between

these two programs, I do not believe the proper balance has been struck. I hope you will give serious consideration to my comments and make the necessary changes to strike the proper balance.

Thank you for your attention on this important matter.

Sincerely,



John F. Kerry
Chairman