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United States Senate
COMMITTEE ON SMALL BUSINESS
WASHINGTON, DC 20510-6350

July 9, 2001

Mr. Robert Gangwere
Acting General Counsel
Small Business Administration
409 Third Street SW
Washington, DC 20416

Dear Mr. Gangwere:

This is a request for an official opinion on the state of the law with respect to firms eligible for both the HUBZone and 8(a) programs. Based on a review of SBA regulations, prompted by complaints I have received from participating firms, it appears that Parts 124 and 126 of Title 13, Code of Federal Regulations, are in conflict. I would appreciate your review of this situation and your response to the questions that follow after a preliminary discussion of the issues.

On June 11, 1998, the Small Business Administration published a final rule in the Federal Register (63 Federal Register 31896-916) to create Part 126 implementing the HUBZone program adopted in the Small Business Reauthorization Act of 1997. One of the difficult issues involved in that rulemaking was the relationship between the HUBZone program and the 8(a) program.

My position regarding parity between the two programs is well-known, but that is not the principal subject of this letter. Instead, I have been informed of confusion concerning firms participating in both programs, despite the apparent clear intent of SBA in granting preference to such firms ahead of firms eligible for only one of those programs. This position is stated in 13 CFR § 126.607, which attempts to create an order of precedence a contracting officer must follow in preparing to set-aside a contract for qualified HUBZone small business concerns (SBCs):

> § 126.607. When must a contracting officer set aside a requirement for qualified HUBZone SBCs?
>
> (a) The contracting officer first must review a requirement to determine whether it is excluded from HUBZone contracting pursuant to § 126.605 [i.e., not available to HUBZone firms because the procurement is to be performed by Federal Prison Industries or Javits-Wagner-O'Day Act entities, is currently performed by an 8(a) concern, or is below the micropurchase threshold].

> (b) The contracting officer must identify qualified HUBZone 8(a) concerns and other 8(a) concerns. The contracting officer must give first priority to qualified HUBZone 8(a) concerns.
> (c) After determining that neither paragraph (a) or (b) of this section apply, the contracting officer must set aside the requirement for competition restricted to qualified HUBZone SBCs if the contracting officer:
>
> (1) Has a reasonable expectation, after reviewing SBA's list of qualified HUBZone SBCs[,] that at least two responsible qualified HUBZone SBCs will submit offers; and
> (2) Determines that award can be made at [a] fair market price.

Although I continue to dispute whether SBA may create an order of precedence between 8(a) and HUBZone program set-asides, the language of this rule contains a clear "priority" for combined HUBZone 8(a) concerns. Moreover, the context of this statement makes it clear that such a priority applies when an 8(a) set-aside has been adopted as a contracting strategy.

For a contract that is currently performed by an 8(a) concern, the priority for combined HUBZone 8(a) firms must take place within an 8(a) set-aside. During recompetition for award under a new contract, requirements currently performed by an 8(a) concern are excluded from consideration for HUBZone set-asides under § 126.607(a). A contracting officer may request that SBA release the requirement from the 8(a) program, but § 126.606 makes clear that SBA will do so only if no other 8(a) firms (and, therefore, no HUBZone 8(a) firms) are available to perform the requirement. Thus, when a current 8(a) requirement is being considered for recompetition, SBA will insist that the new contract be awarded through the 8(a) program. The priority statement in § 126.607(b) makes clear that a HUBZone 8(a) concern will receive priority over other 8(a) firms. However, the regulations governing award of competitive 8(a) contracts have not been revised to incorporate the preference envisioned in § 126.607. (See, for example, §§ 124.506, 124.507.)

For a contract that is not currently performed by an 8(a) concern, authority rests with the contracting officer to determine the procurement strategy. Under § 124.501(f), an 8(a) participant may identify a requirement that "appears suitable for award through the 8(a)" program. The 8(a) firm may "request" SBA to contact the contracting officer to "request" that the requirement be offered through the 8(a) program. Alternatively, the contracting officer may start the process by "indicat[ing] his or her formal intent to award a procurement as an 8(a) contract by submitting a written offering letter to SBA." (§124.502(a).) Whether SBA contacts the contracting officer to "request" the procurement or whether the contracting officer decides to seek such a procurement strategy, the discretion to seek the procurement through the 8(a) program rests with the contracting officer.

For competitive set-asides in either case--requirements currently performed through the 8(a) program, or requirements that the contracting officer opts to pursue through the 8(a) program, the procuring activity is the decisionmaker in making the award, in conformity with the Federal Acquisition Regulation (FAR). The FAR, in turn, must conform to SBA's HUBZone regulations (necessarily including the HUBZone 8(a) priority at § 126.607(b)). Small Business Reauthorization Act of 1997, § 605(b).

Thus, if a contract is currently performed under the 8(a) program, or if it is not currently performed under the 8(a) program but the contracting officer requests it and SBA accepts, award must be made to a combined HUBZone 8(a) firm ahead of any other. The only remaining question is what happens when the contracting officer adopts a competitive HUBZone set-aside as a procurement strategy.

If the contracting officer wishes to do so, he or she may use a HUBZone set-aside, notwithstanding the attempt in § 126.607 to mandate first preference for use of the 8(a) program. First, the statutory language vests this authority in the contracting officer, "notwithstanding any other provision of law." Small Business Act, § 31(b)(2). Second, the 8(a) regulations themselves are discretionary. SBA may "request" that a contracting officer award through the 8(a) program (§ 124.501(f)), or a contracting officer may offer the requirement to SBA (§ 124.502(a)), but the 8(a) regulations do not mandate that a contracting officer use the 8(a) program for requirements not currently performed through the 8(a) program. SBA's attempt to use the HUBZone regulations to impose a binding 8(a) requirement on contracting officers is contrary to SBA's own regulations as well as statute.

In cases in which a contracting officer elects to use his or her authority to use a competitive HUBZone set-aside, § 126.607(c) does not on its face specify that a contracting officer must give priority to an 8(a) firm. If the contracting officer wishes to do so, he or she may request that the procurement be done through the 8(a) program, in which case the foregoing analysis would prevail and the HUBZone firm would receive priority. If the contracting officer elects not to use the 8(a) program as a procurement strategy, and instead intends to award the contract under the authority granted under the HUBZone program, nothing specifies that the contracting officer must give preference to a firm that happens to be an 8(a) participant as well. However, I believe this creates an anomalous and confusing situation that discourages contracting officers from using the HUBZone program.

In view of these considerations, I ask for your legal opinion on the following questions:

[1] Generally, do you agree with the foregoing discussion? Why or why not?

[2] The HUBZone regulations in Part 126 attempt to mandate first use of the 8(a) program, even though the 8(a) regulations in Part 124 are discretionary, not mandatory. Are contracting officers mandated to use the 8(a) program under these rules, or are contracting officers merely directed to exercise their discretion (making either a yes or no decision) before proceeding with a HUBZone set-aside? Please provide statutory citations that give authority for the regulatory scheme.

[3] Is the combined HUBZone 8(a) priority an award priority or a programmatic priority? If it is programmatic, does this imply creation of a "competitive HUBZone 8(a) set-aside," and what statutory authority would support such a program?

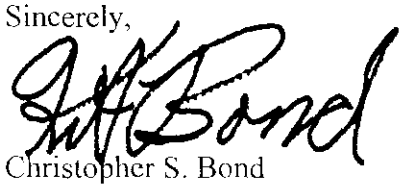
[4] Is the combined priority an award priority in determining that 8(a) firms would have preference in a HUBZone set-aside, and that HUBZone firms would have preference in 8(a) set-asides?

[5] Is the preference for combined HUBZone 8(a) firms applicable whether a contract is awarded through the 8(a) program or through the HUBZone program?

[6] Does Part 124, governing the 8(a) program, properly reflect the SBA policy set forth in Part 126, governing the HUBZone program? If not, what conforming changes need to be made to Part 124 to incorporate the combined HUBZone 8(a) priority? What clarifying changes, if any, need to be made to Part 126?

Because a number of contracting decisions are awaiting clarification of these issues, your prompt response will be vital and helpful. I request that you respond by August 15, 2001. If you have questions about this letter, please contact Cordell Smith of my Small Business Committee staff on (202)224

Sincerely,



Christopher S. Bond
Ranking Member

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