



2019 Small Business Conference

Understanding and Navigating Legal
Complexities for Small Business



TLINGIT
HAIDA

TRIBAL BUSINESS CORPORATION

Topics

Interactive is the Best
Result

Panel 809

HUBZone Changes

FAR Changes-DFAR
Deviation

Revisiting Mentor Protégé-
Measurable Milestones?

Panel 809

The 809 Panel was established by Congress in the FY 2016 NDAA to address issues with the way DoD buys what it needs to equip its warfighters. Since its inception, the panel has published an Interim Report and three-volume Final Report, containing a total of 98 recommendations aimed at changing the overall structure and operations of defense acquisition both strategically and tactically. Some changes hold potential for immediate effect, such as those that remove unnecessary layers of approval in the many steps contracting officers and program managers must take and remove unnecessary and redundant reporting requirements. Other changes require a large shift in how the system operates, such as buying readily available products and services in a manner similar to the private sector and managing capabilities from a portfolio, rather than program, perspective. Such an array of proposed improvements offers short-term gains that will help inspire enthusiasm, as well as a commitment to achieving the long-term systemic changes and supporting continuous improvement.



15 Day Release Proposed

Page 283 of 586 (Third Volume)

15 Day
Release?
What? No?
Page 283 of
586 (Third
Volume)

The report proposes to amend the SBA's CFR to make the SBA respond within 15 days. That section would read: (d) Within 15 working days of the request, the SBA will inform the awarding agency contracting officer of its decisions to concur or non-concur. If the SBA does not inform the awarding agency within that period, release from the 8(a) program shall be presumed and the awarding agency is authorized to proceed with soliciting and award outside the 8(a) program.

Even Worse? Section 809 Panel-Page 31?

Page 31- Section 809 Panel

The statutory reservation of all contract awards under the current simplified acquisition threshold, and additional set-aside provisions in FAR Part 19, are inconsistent with the strategy proposed in the Volume 1 Report and directed by the FY 2019 NDAA. For DoD to fully implement a strategy that focuses on investing in innovative small businesses and ensures DoD maintains technical dominance over near-peer competitors and emerging adversaries, DoD needs flexibility to determine how it meets the goals established by the Small Business Administration (SBA).

Page 31 Continued

Consequently, DoD must be able to implement a deliberate strategy to meet its small business goals through investments in innovation to ensure a robust industrial base. Much of that investment could come in the form of procuring privately developed, readily available technology solutions. Set-asides do not create the proper incentives for

Section 809 Panel-Wait for It

DoD to procure readily available products, and these programs have the potential to stunt, rather than encourage, small business growth.

As discussed in the *Volume 1 Report*, set-asides and other small business programs incent small businesses to make extraordinary efforts to remain small.⁷³ Setting-aside all procurements under a certain dollar threshold does not encourage a small business to grow beyond that threshold, especially if that business relies on competing for procurements that are currently set aside for small business. Outgrowing the size standard makes those businesses ineligible to compete for the same contracts that, in many cases, were critical to the success of the small business. Using a price preference and requiring DoD to continue to meet the overarching small business use goal established by SBA will ensure the same amount of DoD dollars are invested in small business, while allowing capable small businesses to grow and compete for opportunities. Such a requirement could help achieve Congress's direction to DoD to "create opportunities and a pathway for small businesses to grow and compete for future DoD contracts as larger entities" where set-asides fall short for one reason or another.⁷⁴

Purpose of Category Management

The Government designed the Category Management (CM) system in an attempt to eliminate redundancies, increase efficiency, and deliver more value and savings from acquisition programs



Started out in 2005 as a method for managing contracts procured by the Government



Has become a procurement policy with **unintended negative consequences** on both small and other-than-small business

CM is Fully Introduced

In 2014, CM was introduced to strengthen federal acquisition practice and leverage federal agencies' buying power and collectively manage commonly purchased goods and services by allowing the Government to act as a single buyer with certain contract vehicles managed by such agencies as the General Services Agency (GSA).



GSA and the Office of Federal Procurement Policy (OFPP) spearheaded the last administration's initial push to manage spending through the Super 10 categories

Negative Consequences

Lessening of competition by sidelining eligible businesses who would otherwise compete

Competition is restricted to contractors cleared for the CM vehicle

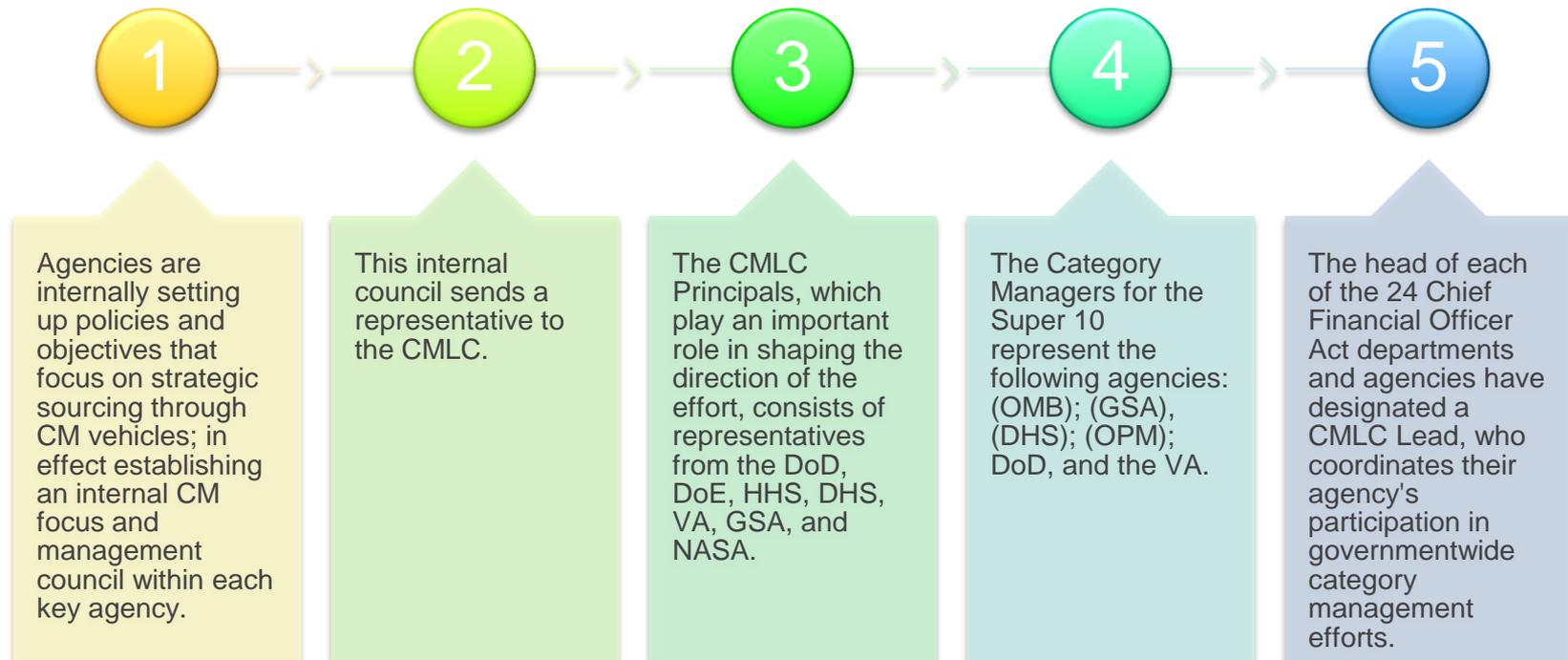
Long-term increases in procurement costs

Hammering small businesses' opportunities

Removing small business contracts from SBA programs and control.



Governmental Category Management Leadership Council (CMLC)



10 Super Categories, or buckets



Government-Wide Category Organization

Common Government Spend Categories (total FY 2015 spend \$272B)

1. IT – \$50.7B 1.1 IT Software 1.2 IT Hardware 1.3 IT Consulting 1.4 IT Security 1.5 IT Outsourcing 1.6 Telecommunications	2. Professional Services – \$63.4B 2.1 Business Administration Services 2.2 Legal Services 2.3 Management Advisory Services (Excludes R&D 17.0) 2.4 Marketing and Distribution 2.5 Public Relations and Professional Communications Services 2.6 Real Estate Services 2.7 Trade Policy and Services 2.8 Technical and Engineering Services (non-IT) (Excludes 1.0) 2.9 Financial Services 2.10 Social Services	3. Security and Protection – \$5.3B 3.1 Security Animals & Related Services 3.2 Security Systems 3.3 Security Services	4. Facilities & Construction - \$72.5B 4.1 Construction Related Materials 4.2 Construction Related Services 4.3 Facility Related Materials 4.4 Facility Related Services 4.5 Facilities Purchase & Lease	5. Industrial Products and Services - \$11.0B 5.1 Machinery & Components 5.2 Fire/Rescue/Safety/Environmental Protection Equipment 5.3 Hardware & Tools 5.4 Test & Measurement Supplies 5.5 Industrial Products Install/Maintenance/Repair/Rebuild 5.6 Basic Materials 5.7 Oils, Lubricants, and Waxes
6. Office Management - \$1.7B 6.1 Office Management Products 6.2 Office Management Services 6.3 Furniture	7. Transportation and Logistics Services – \$25.6B 7.1 Package Delivery & Packaging 7.2 Logistics Support Services 7.3 Logistics Civil Augmentation Program 7.4 Transportation of Things 7.5 Motor Vehicles (non-combat) 7.6 Transportation Equipment 7.7 Fuels	8. Travel and Lodging - \$2.2B 8.1 Passenger Travel 8.2 Lodging 8.3 Travel Agent & Misc. Services	9. Human Capital - \$4.7B 9.1 Alternative Educational Systems 9.2 Educational Facilities 9.3 Educational Institutions 9.4 Specialized Educational Services 9.5 Vocational Training 9.6 Human Resources Services	10. Medical - \$35.2B 10.1 Drugs and Pharmaceutical Products 10.2 Medical Equipment & Accessories & Supplies 10.3 Healthcare Services <div style="border: 1px solid black; padding: 5px; margin-top: 5px;"> Note: Spend figures are based on FY15 FPDS </div>

Common vs. Defense

There is a distinction between fiscal spending for common goods (items all agencies need) and defense-centric spending (only items needed by DoD).

DoD engages in the Government-wide Category Management structure via five representatives on the CMLC.

These representatives, from the Army, Air Force, Navy, Defense Logistics Agency, and Office of the Secretary of Defense, oversee DoD Category Management.



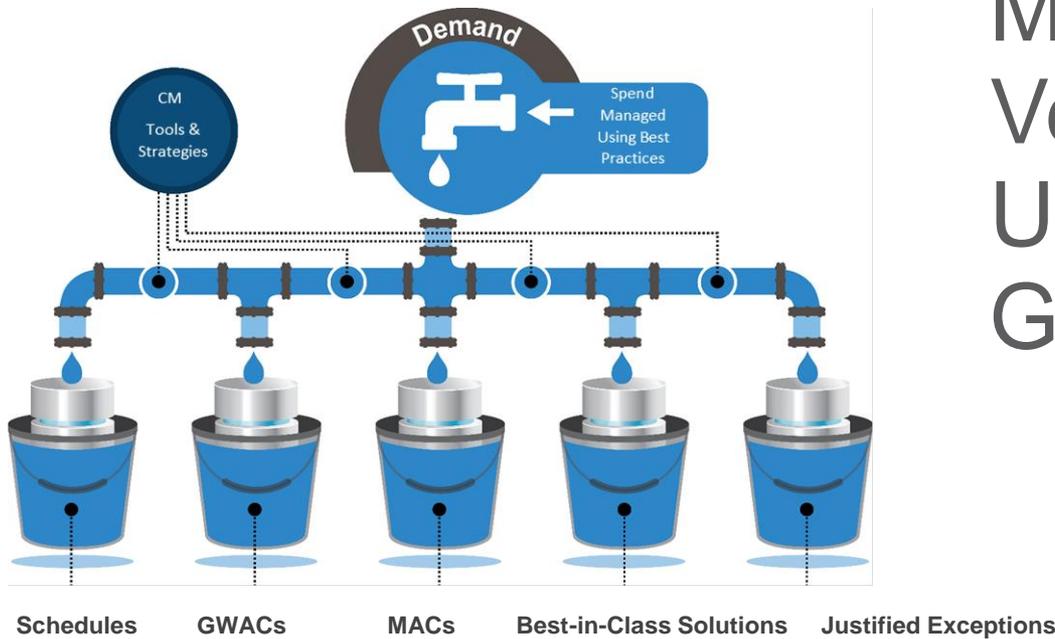
Government-Wide Category Structure (total FY 2014 spend \$428B)

Common Government Spend Categories 1-10 (total FY 2014 spend \$275B)

1. IT - \$49.9B	2. Professional Services - \$61.9B	3. Security and Protection - \$5.5B	4. Facilities & Construction - \$75.7B	5. Industrial Products and Services - \$10.5B
1.1 IT Software 1.2 IT Hardware 1.3 IT Consulting 1.4 IT Security 1.5 IT Outsourcing 1.6 Telecommunications	2.1 Business Administration Services 2.2 Legal Services 2.3 Management Advisory Services (Excludes R&D 17.0) 2.4 Marketing and Distribution 2.5 Public Relations and Professional Communications Services 2.6 Real Estate Services 2.7 Trade Policy and Services 2.8 Technical and Engineering Services (non-IT) (Excludes 1.0) 2.9 Financial Services 2.10 Social Services	3.1 Security Animals & Related Services 3.2 Security Systems 3.3 Security Services	4.1 Construction Related Materials 4.2 Construction Related Services 4.3 Facility Related Materials 4.4 Facility Related Services 4.5 Facilities Purchase & Lease	5.1 Machinery & Components 5.2 Fire/Rescue/Safety/Environmental Protection 5.3 Equipment 5.4 Hardware & Tools 5.5 Test & Measurement Supplies 5.6 Industrial Products 5.7 Install/Maintenance/Repair/Rebuild 5.8 Basic Materials 5.9 Oils, Lubricants, and Waxes
6. Office Management - \$1.9B	7. Transportation and Logistics Services - \$26.8B	8. Travel and Lodging - \$2.7B	9. Human Capital - \$4.1B	10. Medical - \$36.0B
6.1 Office Management Products 6.2 Office Management Services 6.3 Furniture	7.1 Package Delivery & Packaging 7.2 Logistics Support Services 7.3 Logistics Civil Augmentation Program 7.4 Transportation of Things 7.5 Motor Vehicles (non-combat) 7.6 Transportation Equipment 7.7 Fuels	8.1 Passenger Travel 8.2 Lodging 8.3 Travel Agent & Misc. Services	9.1 Alternative Educational Systems 9.2 Educational Facilities 9.3 Educational Institutions 9.4 Specialized Educational Services 9.5 Vocational Training 9.6 Human Resources Services	10.1 Drugs and Pharmaceutical Products 10.2 Medical Equipment & Accessories & Supplies 10.3 Healthcare Services

Defense-Centric Spend Categories 11-19 (total FY 2014 spend \$153B)

11. Aircraft, Ships/Submarines & Land Combat Vehicles - \$41.6B	12. Weapons & Ammunition - \$15.1B	13. Electronic & Communication Equipment - \$8.7B	14. Sustainment S&E - \$22.7B	15. Clothing, Textiles & Subsistence S&E - \$7.5B
11.1 Aircraft 11.2 Land Combat Vehicles 11.3 Ships & Submarines 11.4 Space	12.1 Ammunition & Explosives 12.2 Fire Control 12.3 Guided Missiles 12.4 Guns 12.5 Nuclear Ordnance 12.6 Weapons	13.1 Communication Equipment 13.2 Detection & Coherent Radiation 13.3 Equipment 13.4 Electrical and Electronics Equipment 13.5 Night Vision Equipment	14.1 Drones 14.2 Engines, Components & Spt Eq 14.3 Materials 14.4 Supply Parts 14.5 Support Ships & Small Craft 14.6 Training Aids and Devices	15.1 Subsistence 15.2 Textiles, Clothing & Equipage
16. Miscellaneous S&E - \$839M	17. Research and Development - \$40.0B	18. Equipment Related Services - \$16.5B	19. Electronic Communication Services - \$418M	Note: Spend figures are based on FY14 FPDS data.
16.1 Non-Food Items for Resale 16.2 S&E Not Classified Elsewhere	17.1 Systems Development 17.2 Operational Systems Development 17.3 Technology Base 17.4 Commercialization 17.5 Pre-FY 1998 2-Digit Category	18.1 Maintenance, Repair and Overhaul 18.2 Equipment Modification 18.3 Installation of Equipment 18.4 Quality Control 18.5 Technical Representative Services 18.6 Purchases and Leases 18.7 Salvage Services	19.1 Equipment Maintenance 19.2 Equipment Leases	



Major CM Vehicles Being Used by the Government

Potential Solutions-Just me Saying

Exempt	Exempt SBA set-asides from CM Super categories-proposed legislation is in play in the House of Representatives;
Make	Make mandatory consideration of small businesses for contracts part of any contract procurement analysis, including changing the FAR to incorporate that analysis;
Allow	Allow SBA to have a voice and a vote on the procurement governing council for CM; and/or
Request	Request SBA to evaluate the current large contracting vehicles with the goals of the Government in mind when it comes to small business opportunities and competition and make recommendations based on its findings.



Threat to Small Business

Beth Strum, who testified on behalf of the U.S. Women's Chamber of Commerce stated that the Chamber has ***"never encountered a threat to small businesses' full and fair access to federal contracts like what is confronting us now."***

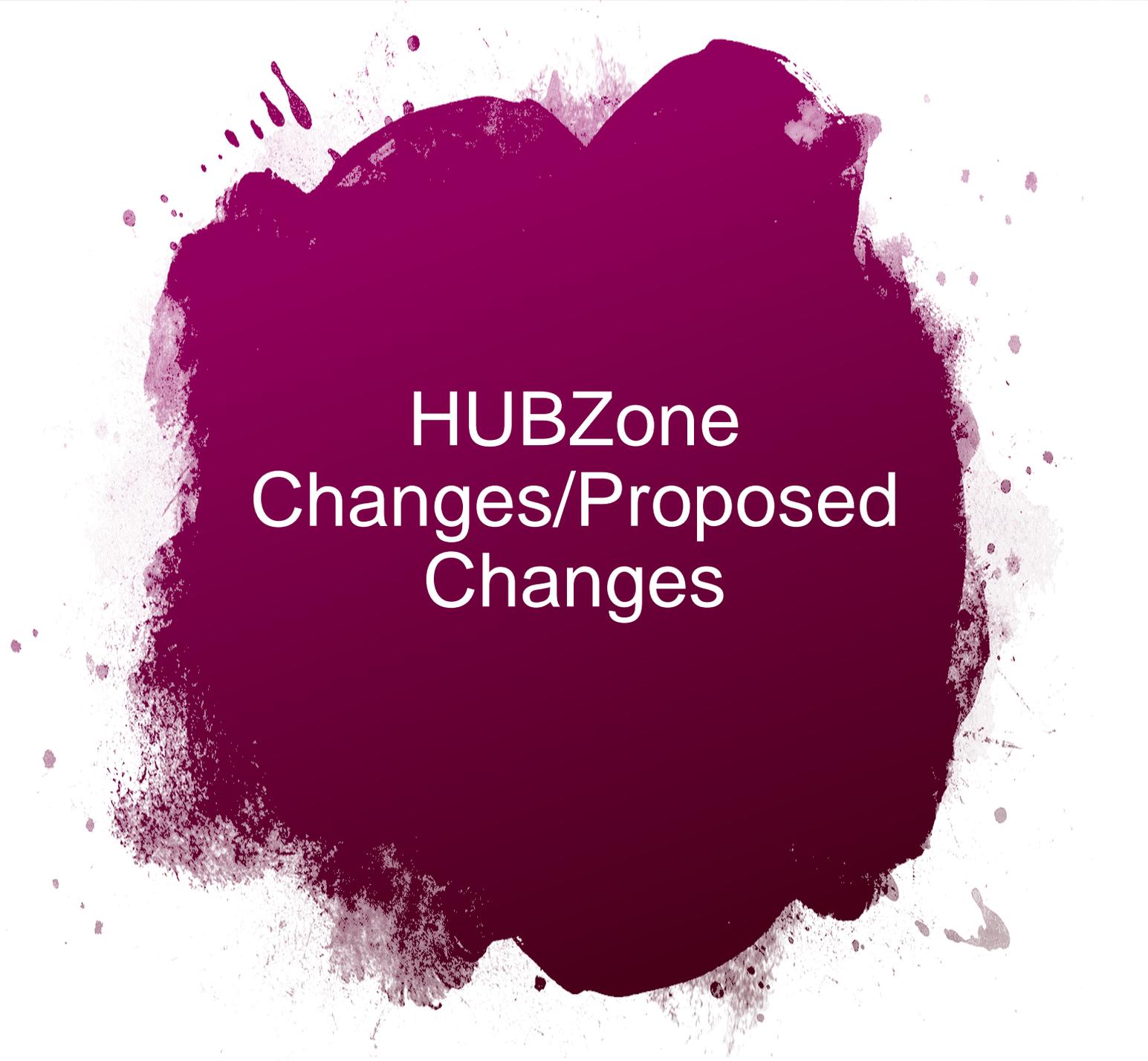
Threat to Small Business

The threat is only increasing. Using FY 2016 procurement spend as a base, CMLC is calling on agencies to hit 40 percent more dollars by 2020.

CM management is scheduled to become the vehicle for restricting competition by delivering short-term results while dimming the lights on the future unless measures are put in place to restrict its usage.

Small business, **a driving force in the American economy**, is particularly vulnerable and the negative effects of the inefficiency and lack of competition of Contract Management will only grow in its impact.





HUBZone Changes/Proposed Changes

Residency and Certification

FIRST

Proposes to treat an individual as a HUBZone resident if that individual worked for the firm and resided in a HUBZone at the time the concern was certified or recertified ***EVEN IF***

The area where the individual works no longer qualifies as a HUBZone OR

The individual has moved to a non-HUBZone area.

Eligibility Demonstration

SECOND

Reduce the burden on firms to almost continuously demonstrate eligibility (compare and contrast to other SBA Programs)

Think 3 points-eligibility, bid, award (each time)

Used to think of it off-hand as the once and out rule

35% hard to meet for both small but larger firms (employee base hard to find in HUBZone) and smaller firms (one employee throws the balance)

Proposed Rule: ANNUAL CERTIFICATION

Annual Certification

A firm would certify it is a certified HUBZone small business at the time of the offer but the certification would related back to the annual certification or recertification

35% at the time of the certification or recertification

Annual? How does this look next to other programs?

Comments Requested Seasonal Employees

Should seasonal employees count?

Annual certification or recertification?

If so, how to address that? Seasonal business?

Definition: Attempt to Maintain: Current

35%-Attempt to maintain

Clarify what happens if a HUBZone small business concern's residency percentage drops too low

Statutory requirement seeks to ensure that HUBZone contract funds flow HUBZone areas and the residents of those areas while (also) recognizing that a HUBZone small business may need to hire additional employees in order to fully meet the terms of a contract

Definition: Attempt to Maintain: Proposed

Current regulation: “making substantive and documented efforts such as written offers of employment, published advertisement seeking employees, and attendance at job fairs.” 13 CFR 126.103

SBA believes that it is necessary to clarify that if the HUBZone residency percentage drops too low, then SBA will find that the HUBZone small business has not made its best efforts to “attempt to maintain” compliance with this requirement

SBA is proposing to amend to add that falling below 20% residency will be deemed a failure to attempt to maintain

Request Comments



How to best look at the 20% minimum requirement



Whether a different percentage (other than 20%) would unreasonably diminish the impact of the program



OR does it accomplish the Objectives without unduly burdening firms performing contracts

Definition of Employee

Key to the HUBZone Program-Major
Factor in Determining Eligibility

Definition of Employee



35% Residing in HUBZone



SBA believes clarification is necessary because the existing language of 40 hours a month is ambiguous



Proposed Rule: Explain that an individual is an employee if he or she works 40 hours during the four-week period immediately prior to the to the relevant date



Relevant Date-Immediately prior to the date of application or date of recertification

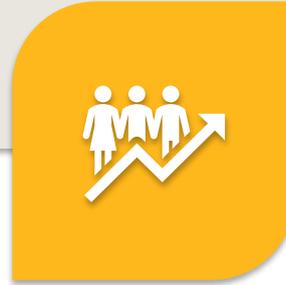
Definition of Employee-40 Hours Examples

SBA will review the firm's payroll records for the most recently completed pay periods that account for the four-week period immediately prior to the date of application or date of recertification in order to determine which individuals meet this definition

Weekly-then last four pay periods

Two week pay periods-then SBA will review for the two most recently completed pay periods

Definition of Employee- Not Hours- General



CONTINUES TO SPECIFY
THAT EMPLOYEES INCLUDE
TEMPORARY AND LEASED
EMPLOYEES



INDIVIDUALS OBTAINED VIA
UNION AGREEMENT, AND CO-
EMPLOYED THROUGH PEO



REQUEST COMMENTS-
SHOULD SBA CONSIDER
ONLY FTE OR FTE
EQUIVALENTS

Employee- Who Counts? How?



Proposed Rule: “All owners of a HUBZone applicant or firm who work at least 40 hours per month will be considered employees, regardless of whether they receive compensation.”



SBA believes anytime an owner works 40 hours a month, he/she should be counted



If the owner works **less than** 40 hours during the 4-week period prior to the relevant date of review, but has not hired another individual to direct the actions of the business, then that owner will be considered an employee as well

Proposed
Change
Considered:
40 Hours Per
Month to 20
Hours Per
Week-
Request
Comments



Really goes from 40 Hours Per Month to 80 Hours Per Month



Doubles the Requirement



Small Business/Start Up Room?



Why?



“Purpose of the HUBZone Program is to stimulate meaningful employment”



REQUESTS COMMENTS

What is Compensation that Counts?

1

Proposed Definition
“clarifies” that individual who
do not receive compensation
and those who receive
deferred compensation are
generally not considered
employees

2

The Proposed Definition
further clarifies that
individuals who receive in-
kind compensation
commensurate with the work
performed will be considered
employees

Example of Commensurate and In-Kind (NOT Tax Advice Here)



Works 40 hours and receives value of 10 hours = NOT in-kind = NOT employee



In-kind is considered non-monetary compensation, or anything other than cash, wages, salary, or other monetary benefit received in exchange for work performed



“SBA intended the word compensation to be read broadly and to encompass more than wages.”



“Food, housing or other non-monetary compensation in exchange for work performed would be not considered a volunteer.”

SBA Requests Comments on In-Kind

Is it reasonable to continue treating in-kind compensation this way, and on how to measure whether in-kind compensation this way, and on how to measure whether in-kind compensation is commensurate with work performed

Deferred Compensation



Compensation that is not received at the time it is earned, but is received sometime in the future



SBA does not count folks that receive deferred compensation as employees because individuals are not receiving a present economic benefit from working for the firm = inconsistent with intent of program



COFC case on this

Independent Contractors

Clarification-IRS 1099ers

Generally not considered employees as long as not considered size under SBA's Size Policy No. 1

It would not make sense to find an individual to be an employee of the firm when determining size, but then not consider the same individual to be employee for HUBZone



SBA requests comments on how SBA should treat individuals who are employed through an agreement with a third-party business that specializes in providing HUBZone resident employee to prospective HUBZone small business concerns for the specific purpose of achieving and maintaining eligibility



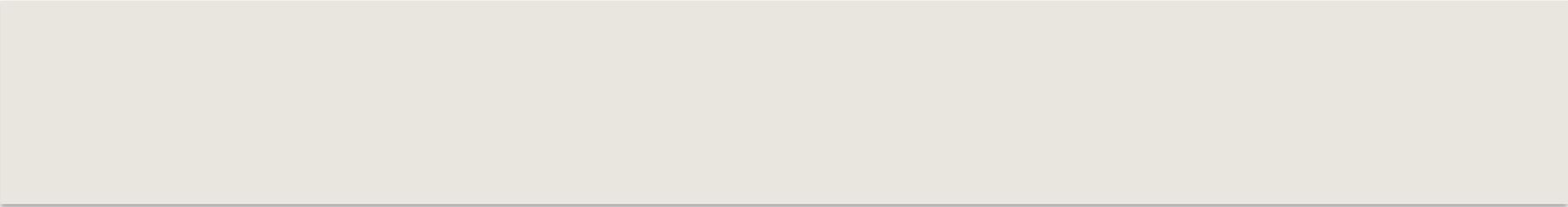
One individual working 10 hours a month for different companies



SBA has seen several times-public input on whether or not consistent with HUBZone purposes

Comments Requested- Employee





Re-Define
HUBZone
Small
Business
Concern

“To remove ambiguities in the regulation”

Current definition: copied directly from the Small Business Act and only addresses the ownership and control

Proposed: revised to state that “a HUBZone small business concern” or “certified HUBZone business concern” means:

A small business concern that meets all the requirements of 126.200 and that SBA has certified as eligible for federal contracting assistance



Replace qualified HUBZone
concern with certified HUBZone
small business concern



Reinforces that firms must
apply and be certified



NDA 2017-
Sec. 1701(i)
Proposed
Changes

Grandfathers in firms for a bit when the census map changes as long as other eligibility criteria are met

Until SBA updates maps-Principal office

In order to be considered qualified:

- Continue to meet ownership and control requirements
- Continue to meet the 35% residency
- And maintain its principal office in the re-designated area or another qualified HUBZone



This will Freeze Maps

Freeze HUBZone maps with respect to qualified census tracts, qualified non-metro counties, and re-designated areas

As a result, all re-designate areas in existence on December 12, 2017, the expiration of their HUBZone treatment until December 31, 2021

Pallick Law, LLC
and Proprietary

Mentor
Protégé
Tips and
Tales from
the
Trenches

Who

Does

What

With Whom

Why

How

Measurable Milestones