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How does an ANC-owned firm qualify for the HUBZone program?

To qualify for the program, an ANC-owned concern must meet the following criteria:

A. Meet the definition of a "HUBZone small business concern" (HUBZone SBC):13 CFR 126.103:

> HUBZone small business concern (HUBZone SBC) means an SBC that is:
> ….
> (2) An ANC owned and controlled by Natives (as determined pursuant to section 29(e)(1) of the ANCSA, 43 U.S.C. 1626(e)(1));
> (3) A direct or indirect subsidiary corporation, joint venture, or partnership of an ANC qualifying pursuant to section 29(e)(1) of the ANCSA, 43 U.S.C. 1626(e)(1)), if that subsidiary, joint venture, or partnership is owned and controlled by Natives (as determined pursuant to section 29(e)(2) of the ANCSA, 43 U.S.C. 1626(e)(2));

B. Maintain its principal office in a HUBZone:

This is the area of great confusion because of the differences between the requirements of the 8(a) program concerning the "Primary Office" and the HUBZone requirements for "Principal Office" have vastly difference elements. The 8(a) definition of "principal place of business" and the HUBZone definition of "principal office" are not the same and lead to different locations. The 8(a) definition is a "functional" standard – the locale of the managers – while the HUBZone definition is quantitative – where the largest number of employees work.

The pertinent regulations are:

8(a)Program definition of principal office - 13 CFR 124.3.

Principal place of business means the business location where the individuals who manage the concern's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where the business records are kept are in different locations, SBA will determine the principal place of business for program purposes.

HUBZONE Program definition of principal office - 13 CFR 126.103:
Principal office means the location where the greatest number of the concern's employees at any one location perform their work. However, for those concerns whose ``primary industry" (see 13 CFR 121.107) is service or construction (see 13 CFR 121.201), the determination of principal office excludes the concern's employees who perform the majority of their work at job-site locations to fulfill specific contract obligations.

The real problem arises from the fact that that CCR listing of primary office uses the 8(a) (functional) test, and when a company applies for HUBZone status, it is being rejected because the principal office shown in CCR is not in a HUBZone, although the place where the largest number of employees work is in a HUBZone. If this happens, you need to file the on-line application, have it rejected, then communicate directly with SBA and explain the situation. The HUBZone office has been reasonable prompt in approving applications.

If the location of the principal office is ever challenged by SBA, it will typically request the following documentation: “Provide official payroll documentation for the past 30 days, to include; but not be limited to; each employees name(s), each employees address(es); the number of hours worked per week by each employee (d) clearly identify all HUBZone resident employee(s).”

C. Have 35% of Employees reside in HUBZones:

At least 35% of the concern's employees must reside in a HUBZone. The employees do not have live in the same HUBZone, nor live in the HUBZone where the principal office is locates. When the application is filed, the 35% requirement must be met. After certification, the concern must attempt to maintain the 35% but is not disqualified or excluded if the percentage is below the threshold.

D. Determining the Number of Employees:

The definition of *employee* (13 CFR 126.103):

Employee means a person (or persons) employed by a HUBZone SBC on a full-time (or full-time equivalent), permanent basis. Full-time equivalent includes employees who work 30 hours per week or more. Full-time equivalent also includes the aggregate of employees who work less than 30 hours a week, where the work hours of such employees add up to at least a 40 hour work week. The totality of the circumstances, including factors relevant for tax purposes, will determine whether persons are employees of a concern. Temporary employees, independent contractors or leased employees are not employees for these purposes.

> *Example 1:* 4 employees each work 20 hours per week; SBA will regard that circumstance as 2 full-time equivalent employees.
>
> *Example 2:* 1 employee works 20 hours per week and 1 employee works 15 hours per week; SBA will regard that circumstance as not a full-time equivalent.
>
> *Example 3:* 1 employee works 15 hours per week, 1 employee works 10 hours per week, and 1 employee works 20 hours per week; SBA will regard that circumstance as 1 full-time equivalent employee.
>
> *Example 4:* 1 employee works 30 hours per week and 2 employees each work 15 hours per week; SBA will regard that circumstance as 1 full-time equivalent employee.

E. "Attempt to Maintain" the 35% Employee HUBZone Residency Requirement

<u>1. Step One: Initial Certification</u>

126.200(b) Concerns owned by U.S. citizens, ANCs or CDCs

....

(5) Contract Performance. The concern must represent, as provided in the application, that it will ``***attempt to maintain***" (see Sec. 126.103) having 35% of its employees reside in a HUBZone during the performance of any HUBZone contract it receives.

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2. Step Two: Reps and Certs requirements

Sec. 126.601 What additional requirements must a qualified HUBZone SBC meet to bid on a contract?

(c) At the time a qualified HUBZone SBC submits its initial offer, and where applicable its final offer, on a specific HUBZone contract, it must certify to the CO that:

....

(4) If the qualified HUBZone SBC was certified pursuant to Sec. 126.200(b), it must represent that it will ***``attempt to maintain''*** (See Sec. 126.103) the required percentage of employees who are HUBZone residents during the performance of a HUBZone contract.

Step Three: Requirements During Contract Performance

Sec. 126.602 Must a qualified HUBZone SBC maintain the employee residency percentage during contract performance?

Qualified HUBZone SBCs eligible for the program pursuant to Sec. 126.200(b) must ***``attempt to maintain''*** (See Sec. 126.103) the required percentage of employees who reside in a HUBZone during the performance of any contract awarded to the concern on the basis of its HUBZone status.

Step Four: Definition of "Attempt to Maintain"

126.103 – Definitions

Attempt to maintain means making substantive and documented efforts such as written offers of employment, published advertisements seeking employees, and attendance at job fairs.

F. Maintaining Eligibility

A qualified HUBZone SBC must immediately notify SBA of any material change that could affect its eligibility. Material change includes, but is not limited to, a change in the ownership, business structure, or principal office of the concern, or a failure to meet the 35% HUBZone residency requirement. The notification must be in writing, and must be sent or delivered to the AA/HUB to comply with this requirement. Failure of a qualified HUBZone SBC to notify SBA of such a material change may result in decertification and removal from the list of eligible firms.

A HUBZone firm must certify its eligibility both at the time it submits its initial offer and at the time of contract award. (This is different from the 8(a) requirement that certification is only required at the time of the initial offer).

G. Sole Source Contracts:

A contracting officer may award a sole source contract to a qualified HUBZone SBC only when the contracting officer determines that: (a) The anticipated award price of the contract, including options, will not exceed: (1) $5,000,000 for a requirement within the NAICS codes for manufacturing; or (2) $3,000,000 for a requirement within all other NAICS codes; (b) Two or more qualified HUBZone SBCs are not likely to submit offers; (c) A qualified HUBZone SBC is a responsible contractor able to perform the contract; and (d) In the estimation of the CO, contract award can be made at a fair and reasonable price.

H. Competition:

Contracts may be set aside for competitions limited to HUBZone firms. In a full and open competition, HUBZone firms have a 10% price preference, which may be "stacked" with any SBD price preference.

However, the Department of Defense is currently enjoined from using the the HUBZone price preference provisions is reason of the terms of the permanent injunction issues in the *Rothe* case.

I. Joint Ventures & Prime Contractor Performance Requirement:

Joint ventures are permitted only between two HUBZone firms. In computing the 51% prime contractor performance requirement, the performance of the prime and all first-tier HUBZone subs are combined.

J: Application Process and Documentation:

The time frame for processing of HUBZone applications has increased dramatically in the past year. There have been two highly critical GAO reports on HUBZone program fraud.[1] These have causes SBA to require significantly more documentation of eligibility information.

You can expect SBA to request: "Provide official payroll documentation for the past 30 days, to include; but not be limited to; each employees name(s), each employees address(es); the number

[1] *HUBZone Program: SBA's Control Weaknesses Exposed the Government to Fraud and Abuse* GAO-08-964 July 17, 2008; *HUBZone Program: Fraud and Abuse Identified in Four Metropolitan Areas* GAO-09-440 March 25, 2009

of hours worked per week by each employee (d) clearly identify all HUBZone resident employee(s).”

You can also expect SBA to make a site visit to confirm that the principal office is really an office.