

**Written Testimony of Matthew Thomas Schoonover**

**U.S. House of Representatives**

**Committee on Small Business  
Subcommittee on Contracting and Infrastructure**

*A Review and Assessment of the HUBZone Program*

**July 14, 2022**

Chairman Mfume, Ranking Member Salazar, and esteemed Members of the Subcommittee:

It's my privilege to join you today to discuss SBA's Historically Underutilized Business Zone – or *HUBZone* – Program. This program is unique among SBA's socioeconomic designations, as its purpose is to lift entire communities that have been passed over for economic development.

I'll discuss the specifics of the HUBZone Program momentarily, but first I'd like to tell you a little about myself.

I am the Managing Member of Schoonover & Moriarty LLC, an Olathe, Kansas-based law firm that counsels small business federal contractors. In my practice, I work with clients on a broad range of issues: from complying with the myriad of federal laws, regulations, and contractual provisions covering their work with the federal government; to complying with the U.S. Small Business Administration's small business and socioeconomic program regulations; and representing them in performance disputes and bid protests. I'm also a member of the Board of Directors for the HUBZone Contractors National Council.

My clients provide vital services and products that keep our government functioning. And, as I mentioned, they are almost exclusively small businesses. One of the best parts of my practice is that I see firsthand the benefits that small business federal contracting dollars generate: these business owners provide quality, stable jobs to employees, that generally allow freedom to remain involved in their communities. Without exception, each takes pride in the work they perform for the government.

My clients represent a true cross-section of America. Some are participants in SBA's 8(a) Business Development Program (which focuses on ensuring economic opportunities to those that have suffered economic and social disadvantage) or are service-disabled veteran-owned

small businesses or women-owned small businesses. Some of my clients are also HUBZone companies. And though today's hearing implicates these socioeconomic designations, I am not here to advocate on behalf of any particular client or organization.

While the 8(a), SDVOSB, and WOSB programs focus on providing economic development to companies based on their owners' qualifications, the HUBZone Program is unique in that it attempts to bring economic development to entire communities – or, as the Small Business Act calls them, “economically distressed areas.”<sup>1</sup> One such area is a “qualified census tract” – or any census tract where, under the most recent data, at least 50% of the households have an income that is less than 60% of the area's median gross income, or which has a poverty rate of at least 25%.<sup>2</sup> Other areas include qualified metropolitan counties, lands within the external boundaries of an Indian reservation, redesignated areas, base closure areas, qualified disaster areas, or areas requested by a governor to be included.<sup>3</sup>

If a small business has its principal office located in one of these HUBZone locations, and at least 35% of its employees live in a HUBZone, it may be certified as a HUBZone small business concern.<sup>4</sup> Though these requirements may sound straightforward, in my experience (and that of my clients) they can be anything but.

Regarding the principal office requirement, SBA's regulations contemplate a firm will have a brick-and-mortar location. The principal office, however, may not be the company's headquarters; rather, it is the office where the greatest number of a company's employees

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<sup>1</sup> 15 U.S.C. § 657a(a).

<sup>2</sup> 15 U.S.C. §§ 657a(b)(1), (b)(3)(A)(i); 26 U.S.C. § 42(d)(5)(B)(ii).

<sup>3</sup> 15 U.S.C. § 657a(b).

<sup>4</sup> 15 U.S.C. § 657a(d)(1); *see also* 13 C.F.R. § 126.200. I should note that there are important ownership requirements for a small business concern: in general, the business must be at least 51% owned by a United States citizen; or by an Alaska Native Corporation, Native Hawaiian Organization, or Indian tribe; or by a small agriculture cooperative to qualify.

work.<sup>5</sup> This definition can be especially tricky for services or construction companies, as the regulations exclude from the calculation those employees who work more than half their time at job sites – but, if *all* of a company’s employees work more than half time at job sites, that company definitionally cannot meet the principal office requirement (and, thus, is ineligible for the HUBZone program).

Meeting the 35% employee requirement remains the trickiest eligibility criterion. SBA’s regulations define an employee as any person who works for the concern at least 40 hours *per month*.<sup>6</sup> Of a company’s total number of employees, at least 35% must live in a HUBZone (meaning, they must have resided in the HUBZone for at least 180 days before the company’s certification).<sup>7</sup> Historically, the continuing eligibility requirements for the HUBZone Program essentially meant that companies had to ensure that they always remained in compliance with this requirement, lest they lose their eligibility for a HUBZone contract. This, of course, meant that companies were often spending too much time tracking their employees’ residency – taking their attention away from winning and performing contracts.

To SBA’s credit, it has acted within the last few years to ease the burdens associated with HUBZone compliance. Regarding the principal office requirement, SBA allows a building purchased or leased for ten years or more to be considered to remain in a HUBZone, even if the area’s designation later changes. This provides business owners assurance when deciding where to locate. Employees who continue to live in a HUBZone for 180 days after the company’s certification will continue to count towards the 35% requirement for as long as they remain continuously employed by the company, even if they later move out of a HUBZone.<sup>8</sup>

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<sup>5</sup> 13 C.F.R. § 126.103.

<sup>6</sup> 13 C.F.R. § 126.103.

<sup>7</sup> 13 C.F.R. § 126.200(d).

<sup>8</sup> 13 C.F.R. § 126.200(d)(3).

Finally, SBA has eased the continuing eligibility requirements to provide greater flexibility to HUBZone companies.

If a company meets the HUBZone requirements, it may receive certain benefits. HUBZone businesses may receive non-competitive awards valued at less than \$4.5 million, or \$7 million for manufacturing contracts.<sup>9</sup> There is also a 3% governmentwide prime contracting goal for HUBZone businesses.<sup>10</sup> But, unfortunately, awards to HUBZone companies have historically fallen short of this goal. SBA’s latest data<sup>11</sup> shows that, when compared to the other socioeconomic program, HUBZone companies continue to get the short-end of the contracting stick:

Prime Contracting Achievement:			59.99%
	2019 Achievement	2020 Goal	2020 Achievement <sup>1, 2</sup>
Small Business	26.50%	23.00%	26.02% (\$145.7 B)
Women Owned Small Business	5.19%	5.00%	4.85% (\$27.1 B)
Small Disadvantaged Business	10.29%	5.00%	10.54% (\$59.0 B)
Service Disabled Veteran Owned Small Business	4.39%	3.00%	4.28% (\$23.9 B)
HUBZone	2.28%	3.00%	2.44% (\$13.6 B)

I view the federal government’s failure to meet its HUBZone contracting goals as indefensible. The point of the HUBZone program focuses on lifting entire communities through the influx of targeted dollars.<sup>12</sup> These communities are, definitionally, underutilized – when the federal government fails to meet its prime contract goals for HUBZone companies, it fails to help provide needed economic development to these areas.

Congress and SBA have recently taken several steps that have the possibility to help HUBZone companies receive a bigger piece of the contracting pie. A recent success includes

<sup>9</sup> 13 C.F.R. § 126.612.

<sup>10</sup> 15 U.S.C. § 644(g)(1)(A)(iii).

<sup>11</sup> 2020 data is available at <https://www.sba.gov/document/support-small-business-procurement-scorecard-overview> (last accessed July 8, 2022). Data for 2021 has not yet been published.

<sup>12</sup> 13 C.F.R. § 126.100.

President Biden signing the bipartisan PRICE Act<sup>13</sup> into law. Also, H.R. 190 (passed by the House in the 116<sup>th</sup> Congress) would help ensure greater opportunities for directed award to small business concerns. But still more work can be done. I'm honored to join today to discuss how the HUBZone Program might be improved.

Congress's efforts to improve the HUBZone program should focus on a single goal: encouraging the use of the program by federal agencies, to ensure contracting dollars impact the communities that need it the most. Here are some ideas:

- 1) **Compel certain agencies to prioritize HUBZone contract awards.** Perhaps the most impactful legislative change would be a mandate that certain federal agencies most connected to economic development—like the Department of Commerce or the Department of Housing and Urban Development—to prioritize contracting with HUBZone businesses. In 2006, Congress took this approach with the Department of Veterans Affairs and SDVOSB contracting, when it passed the Veterans Benefits, Healthcare, and Information Technology Act.<sup>14</sup> Thanks to that Act, whenever the VA solicits a contract, it must set that solicitation aside for SDVOSBs whenever it reasonably believes that two or more SDVOSBs will submit an offer at a fair and reasonable price.<sup>15</sup> In addition, the Act gives VA additional flexibility to issue non-competitive awards to veteran-owned entities.<sup>16</sup>

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<sup>13</sup> Pub. L. 117-88.

<sup>14</sup> Operative contracting provisions are now codified at 38 U.S.C. § 8127.

<sup>15</sup> 38 U.S.C. § 8127(d); see also *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162 (2016) (interpreting the statute).

<sup>16</sup> 38 U.S.C. § 8127(c).

A similar requirement with a different federal agency could carry tremendous benefits to HUBZone companies. Whenever that agency seeks to issue a contract, it would first have to prioritize contracting with HUBZone entities—if two or more HUBZone companies exist that might reasonably submit an offer for the procurement, the agency should be compelled to set that work aside for HUBZone concerns. If not, the agency would have additional flexibility to issue a sole-source award to a particular HUBZone company. Only if those requirements aren't satisfied could that agency instead seek to contract with 8(a) companies, SDVOSBs, WOSBs, or other small businesses. In addition, agencies not subject to the mandate would retain their ability to contract with HUBZone entities. In this way, the priority afforded by this agency would increase the number of awards to HUBZone concerns.

- 2) **Adopt a “once HUBZone, always HUBZone” contracting rule.** Participants in SBA’s 8(a) Business Development Program receive tremendous contracting advantages. One such advantage guarantees that there’s never a shortage of work for 8(a) companies: under the “once 8(a), always 8(a)” rule, a follow-on solicitation to a contract awarded under the 8(a) Program must remain in the 8(a) Program, unless SBA specifically authorizes that follow-on procurement to be solicited under another program.<sup>17</sup>

Adopting a similar rule for HUBZone companies—“once HUBZone, always HUBZone”—will help ensure that work stays in the HUBZone program. Alternatively, changing the “once 8(a), always 8(a)” rule to “once 8(a), always 8(a) or HUBZone” would significantly increase the pool of work for which HUBZone companies might compete.

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<sup>17</sup> 13 C.F.R. § 124.504(d); FAR 19.815.

That is, according to SBA, approximately 10.5% of prime contract awards went to 8(a) companies in 2020; by 2025, President Biden has instructed agencies to issue at least 15% of prime contracts to 8(a) companies.<sup>18</sup> Naturally, however, the more contracts that are reserved for 8(a) businesses means that fewer contracts will be eligible for other socioeconomic programs (unless specifically released by SBA). Allowing HUBZone companies to compete for this same pot of contracts will help provide needed contracting opportunities.

- 3) **Expand the Highway Trust Fund to include HUBZone companies.** Presently, HUBZone small businesses are excluded from competing for opportunities funded under the Department of Transportation (DOT) Trust Fund, which is approximately \$2.3 billion dollars annually. Allowing HUBZone firms to compete would invest many of these dollars back into underutilized communities.
  
- 4) **Redefine the principal office requirement in the age of remote work.** COVID-19 has taught government and industry partners that they must be flexible to adapt to change. As part of this, we've seen both agencies and businesses recognize the possibility of remotely working—successfully. Many employees (and some employers) consider the possibility of remote work to be an important benefit. But by requiring HUBZone concerns to have a physical principal office, the HUBZone Program may threaten the eligibility of companies who allow their employees to work remotely.

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<sup>18</sup> See John Mattox, "Biden Administration Plans to Increase Contracting to Small Businesses," [GovConBrief.com](https://govconbrief.com) (Dec. 20, 2021), available at <https://govconbrief.com/biden-administration-plans-to-increase-contracting-to-small-businesses/> (last accessed July 8, 2022).



In the age of telework, rigid adherence to the principal office requirement may cause otherwise eligible businesses forego participating in the HUBZone Program or may otherwise cause otherwise qualified companies to lose a HUBZone contract. To be clear, the principal office requirement serves an important purpose: by requiring a HUBZone concern to have its principal office in a HUBZone, the government helps ensure that those areas receive economic development. But this isn't the only way to meet this important goal. Granting businesses who offer remote work to satisfy HUBZone eligibility requirements by, for example, having a higher percentage (say 50%) of its employees live in a HUBZone would still ensure that dollars reach these areas. In short, it's possible to change the principal office requirement to reflect today's reality while still honoring the intent of the HUBZone Program.

- 5) **Help small businesses through economic challenges.** Between the pandemic, supply chain difficulties, and, now, inflationary pressures, small businesses have been forced to cope with a tremendously difficult climate over the last three years. In many cases, small businesses perform under fixed-price contracts, often with potential periods of performance spanning five years (if not more). Given this reality, many businesses are now coping with higher costs that simply could not have been planned for when they first bid the project.

The federal government can help ease these pressures for all small businesses by requiring agencies to adjust the fixed contract prices where inflation exceeds a certain percentage, even if the contract does not include an economic price adjustment clause. Unfortunately, the federal government has been unwilling to negotiate any relief to

contractors – on May 25, 2002, in fact, the Department of Defense issued a memorandum instructed contracting officers to *not* equitably adjust fixed contract prices where a contractor's costs increased due to inflation.<sup>19</sup> Essentially, the Department of Defense (and most other agencies) are forcing small businesses to bear these unanticipated costs.

This zero-sum game hurts every small business – but especially HUBZone concerns. Because the point of the Program is to increase economic opportunity in these areas, failing to adjust prices pinches these businesses (and their employees) which, in turn, causes fewer dollars to benefit these areas. Though the federal government can compel these businesses to perform at the contracted price, doing so only harms both parties. Instead, the government should *partner with* its small business contractors to ensure both parties receive the benefits of their relationship.

- 6) Empower SBA to enhance its support to the small business community.** Finally, Congress should increase the support it provides SBA, so that SBA can better meet its mission of supporting the small business community. From my vantage of working with small businesses, SBA is overworked and understaffed. Due in part to the success of their small business contracting programs, response times for contractors continue to increase. Additional funding will help ensure that small businesses receive support sooner and that small business contracts are awarded faster.

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<sup>19</sup> Office of the Undersecretary of Defense, “Guidance on Inflation and Economic Price Adjustments” (May 25, 2002), *available at* <https://www.acq.osd.mil/dpap/policy/policyvault/USA000999-22-DPC.pdf> (last accessed July 8, 2022).

Thank you for the opportunity to testify today. With this background, I am happy to answer any questions and look forward to working with the Committee on improving the HUBZone Program.