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COMBINED 8(a) AND HUBZONE PRIORITY PREFERENCE ACT

OCTOBER 1, 2002.—Ordered to be printed

Mr. KERRY, from the Committee on Small Business and Entrepreneurship, submitted the following

R E P O R T

[To accompany S. 1994]

The Committee on Small Business and Entrepreneurship, to which was referred the bill, S. 1994, to establish a priority preference among certain small business concerns for purposes of Federal contracts, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill (as amended) do pass.

On July 24, 2002, the Small Business and Entrepreneurship Committee considered S. 1994, the "Combined 8(a) and HUBZone Priority Preference Act." The Committee adopted by unanimous voice vote an amendment offered by the Ranking Republican, Senator Christopher S. Bond and the Chairman, Senator John F. Kerry. As amended, S. 1994 would provide certain benefits to small business concerns with both 8(a) Business Development (BD) Program and Historically Underutilized Business Zone Program (HUBZone) certifications (8(a) HUBZone small business concern) under restricted competition contracts within each program; establish a price evaluation preference for the purposes of bidding on Federal procurement contracts under full and open competition for 8(a) HUBZone small business concerns; and raise the sole-source threshold for all 8(a) BD and HUBZone small business concerns to $4 million on goods and services contracts and $6 million for manufacturing contracts, an increase of $1 million for each category. Having considered S. 1994, as amended, the Committee reports favorably thereon without further amendment and recommends that the bill do pass.

I. INTRODUCTION

On June 24, 1997, legislation was introduced by then Chairman of the Committee on Small Business, Senator Christopher S. Bond, to establish a preference program for small business concerns based on their geographic location. The legislation, S. 208, the "HUBZone Act of 1997," provided for Federal contracting opportunities for small businesses located in historically underutilized business zones (HUBZones).

On June 26, 1997 the HUBZone Act was approved by the Committee with an amendment in the nature of a substitute designed to protect the 8(a) Business Development (BD) Program by removing the priority granted the HUBZone Program under the legislation and replacing it with language to establish parity between the 8(a) BD and the HUBZone programs. The HUBZone Act was subsequently included in the Small Business Reauthorization Act of 1997 without further amendment and was signed by President Clinton on December 12, 1997.

On June 11, 1998, the SBA published a final rule in the Federal Register (63 Federal Register 31896–916) to create Part 126 implementing the HUBZone program. One of the difficult issues involved in the rulemaking was the relationship between the HUBZone program and the 8(a) program. Under the 1998 regulations, if the small business concern is certified in both programs, it moves to the front of the line in getting government contracts.

On January 28, 2002, the SBA published a proposal in the Federal Register to amend its HUBZone regulations. Among the proposal's considerable changes to the HUBZone program and its relationship to the 8(a) BD program, the SBA proposed eliminating the "first priority" status granted to HUBZone 8(a) firms. In doing so, the SBA cited an opinion from the SBA General Counsel the agency does not have the statutory authority to grant a special priority to HUBZone 8(a) firms.[1]

The SBA's decision to eliminate the super-priority came at a difficult time for 8(a) BD firms. As demonstrated at the June 19, 2002, Committee roundtable titled, "Are Government Purchasing Policies Hurting Small Business?" 8(a) BD firms are currently experiencing a percentage decline in Federal procurement contract awards, which climbed to 20 percent between Fiscal Years 1998 and 2001.[2]

The cause of this decline has its roots in the new procurement environment created by the reforms in the mid-1990s, such as passage of the Federal Acquisition Streamlining Act [P.L. 103–335] and the Federal Acquisition Reform Act [P.L. 104–106], in the regulatory changes to procurement programs in response to the United States Supreme Court decision, *Adarand Inc.* v. *Pena,* in the reductions in the acquisition workforce and a procurement culture that favors expediency, and short-term cost savings over small business participation. Because negative trends hit socially and economically disadvantaged firms first and hardest, these small businesses have borne a disproportionate share of the percentage

[1] Letter dated August 17, 2001, from Robert Gangwere, Acting General Counsel, Small Business Administration, to Senator Bond.

[2] Based on data reported by the Federal Procurement Data Center.

decline in Federal contract dollars being awarded to small businesses in general.

The HUBZone program has also suffered from the lack of procurement personnel, as well as the current procurement culture of expediency. For example, although the government-wide procurement goal for qualified HUBZone small business concerns was set at 2 percent for FY 2001, the Federal government only achieved 0.72 percent, costing these firms nearly $3 billion in lost contracts.

The Committee believes S. 1994 will re-establish and improve the benefits available to dual-certified small business concerns under the original HUBZone regulations, as well as assist all 8(a) BD and HUBZone small business concerns by raising the sole-source thresholds, thus creating more contracting opportunities for these firms.

II. Legislative History

S. 1994, the "Combined 8(a) and HUBZone Priority Preference Act," was introduced by Senators John F. Kerry and Christopher S. Bond on March 6, 2002. The Committee held a roundtable on June 19, 2002 titled, "Are Government Purchasing Policies Hurting Small Business?" During the roundtable, S. 1994 was a topic of discussion.

Small business advocates that participated in the roundtable supported the re-establishment of a super-priority, known as a "priority preference," as envisioned in S. 1994, and supported the increase in the sole-source thresholds by $1 million for goods and services contracts and manufacturing contracts. However, concerns were raised about the legislation's price evaluation preference of 20 percent under full and open competition for firms with a dual 8(a) Business Development (BD) Program and Historically Underutilized Business Zone (HUBZone) Program certification (8(a) HUBZone small business concerns). Additionally, concerns were raised about the meaning on the word "comparable" when used as a determining factor in awarding bids to 8(a) HUBZone small business concerns under restricted competition within the 8(a) BD and HUBZone Programs.

During consideration of S. 1994, the Committee adopted, by voice vote, an amendment proposed by Senators Bond and Kerry to make changes to the types of benefits available to 8(a) HUBZone small business concerns under restricted competition, as well as to clarify the benefits to these firms for contracts under full and open competition. The amendment also included a provision to clarify when a publicly held small business concern may participate in the HUBZone program.

The amendment was the result of a compromise agreement reached between the Committee's Chairman and Ranking Republican and reflects suggestions raised at the June 19, 2002, Committee roundtable.

III. Analysis of S. 1994, the "Combined 8(a) and HUBZone Priority Preference Act," as Amended

PURPOSE

The primary purpose of the "Combined 8(a) and HUBZone Priority Preference Act," as amended, is to clarify the status of a small

business that is certified in both the HUBZone and 8(a) contracting programs. This amendment will provide statutory authority for a "superpreference" for firms that are certified for both HUBZones and 8(a). This "superpreference" will be afforded to combined HUBZone 8(a) small businesses if their bids are comparable to other firms that are only eligible for one program. The word "comparable" has been difficult to define, and the amendment replaces this "comparable" language with more standard, more understandable language about best value contracts.

S. 1994 also establishes a price evaluation preference for the purposes of bidding on Federal procurement contracts under full and open competition for small business concerns that have received both 8(a) Business Development (BD) Program and Historically Underutilized Business Zone (HUBZone Program) certification. The bill also raises the sole-source threshold for goods and services contracts, as well as manufacturing contracts by $1 million. Finally, the legislation would clarify non-citizen ownership of a HUBZone small business concern and would limit non-citizen ownership of up to fifteen percent (15%) of the outstanding shares of a HUBZone small business concern that is publicly traded.

ESTABLISHMENT OF PRIORITY PREFERENCE

Effect on best value contracting

The Committee-adopted amendment provides that best value contracts would be considered with a separate evaluation factor to recognize bidders participating in both the HUBZone and 8(a) programs. The amendment would replace all the existing set-aside and full-and-open preferences with a best value approach. Best value contracts consider both price and "non-price" factors; giving preference to a firm for its participation in both programs (a HUBZone 8(a) dual status firm) is clearly a "non-price" factor. The Committee believes that implementing this concept in a best value approach makes the most sense. The amendment awards such bidders extra points when their bids are evaluated on "non-price" factors such as the competitiveness of its delivery schedules, quality of the goods or services, and technical support, etc.

Effect on price evaluation preference

As amended, S. 1994 will provide to an 8(a) HUBZone small business concern a price-evaluation preference for contracts under full and open competition. In competition against a small business concern, the price evaluation preference would be 10 percent. In competition against a large business, the price evaluation preference would be 12 percent. For example, if a large business were to bid $100 on a contract and would be the winning bidder, an 8(a) HUBZone small business concern would be awarded the contract with any bid up to $112, if the award were based solely on price. If a small business bid $100 on a contract, an 8(a) HUBZone small business concern would be awarded the contract with any bid up to $110, if the award were based solely on price.

The legislation specifically excludes the 8(a) BD small business concern's 10 percent price evaluation preference stemming from its status as a small disadvantaged business (SDB) concern from being

combined with the price evaluation preference for an 8(a) HUBZone small business concern.

NON-CITIZEN OWNERSHIP

As enacted in 1997, the HUBZone program has encountered issues relating to the statutory requirement that a HUBZone firm be 100% owned and controlled by U.S. citizens. This means that potential applicants for HUBZone certification need to be flesh and blood citizens, either by birth or naturalized. This requirement also raises an issue about potential HUBZone firms with stock that is publicly traded. Because stock may be exchanged at any moment, the management of such a firm cannot certify to the SBA that all its stock is owned and controlled by U.S. citizens.

After consulting with the Securities and Exchange Commission and other interested parties, it was concluded that a HUBZone firm could be certified and maintain its certification so long as non-citizens did not control more than fifteen percent (15%) of the outstanding shares of a HUBZone small business concern that is publicly traded.

SOLE-SOURCE THRESHOLD INCREASE

The cap on the value of a contract that may be awarded to an 8(a)BD or a HUBZone firm under sole-source authority (without competition) is raised by $1 million under the legislation, for both goods and services contracts and manufacturing contracts. The sole-source thresholds for each program would be $4 million for goods and services contracts and $6 million for manufacturing contracts.

IV. COMMITTEE VOTE

In compliance with rule XXVI(7)(b) of the Standing Rules of the Senate, the following votes were recorded on July 24, 2002. A motion by Senator Kerry to adopt an amendment by Senators Bond and Kerry concerning an agreement on the legislation passed by unanimous voice vote. A motion by Senator Kerry to adopt S. 1994, the "Combined 8(a) and HUBZone Priority Preference Act," as amended, was approved by a 19–0 recorded vote, with the following Senators voting in the affirmative: Kerry, Bond, Levin, Harkin, Lieberman, Wellstone, Cleland, Landrieu, Edwards, Cantwell, Carnahan, Burns, Bennett, Snowe, Enzi, Fitzgerald, Crapo, Allen and Ensign.

V. EVALUATION OF REGULATORY IMPACT

In compliance with rule XXVI(11)(b) of the Standing Rules of the Senate, it is the opinion of the Committee that no significant additional regulatory impact will be incurred in carrying out the provisions of this legislation. There will be no additional impact on the personal privacy of companies or individuals who make use of the services provided.

VI. COST ESTIMATE

In compliance with rule XXVI(11)(a)(1) of the Standing Rules of the Senate, the Committee estimates the cost of the legislation will

be equal to the amounts indicated by the Congressional Budget Office in the following letter.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 11, 2002.

Hon. JOHN F. KERRY,
Chairman, Committee on Small Business and Entrepreneurship, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1994, the Combined 8(a) and HUBZone Priority Preference Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

S. 1994—Combined 8(a) and HUBZone Priority Preference Act

S. 1994 would establish new criteria for evaluating bids on certain federal procurement contracts. CBO estimates that implementing S. 194 would cost about $1 million a year, subject to the availability of appropriated funds. The bill would not affect direct spending or receipts, so pay-as-you-go procedures would not apply. S. 1994 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

Under this bill, certain contracts would be deemed less expensive than others when being evaluated for price. For contracts subject to full and open competition, the bill would establish a price preference of up to 12 percent for firms that are dually certified under the Small Business Administration's (SBA's) 8(a) Business Development program and Historically Underutilized Business Zone (HUBZone) program. For contracts restricted to small businesses, firms that are dually certified would be given a price preference over comparable bids from firms that are only certified under the 8(a) program or the HUBZone program.

Based on information from SBA and the Office of Federal Procurement Policy (OFPP), CBO estimates that adding these new evaluation criteria would increase administrative costs about $1 million annually, assuming the availability of appropriated funds. Price preferences could increase federal costs if it resulted in the award of higher-cost contracts, but based on information from SBA and OFPP, we expect that such effects would be insignificant.

The CBO staff contact for this estimate is Matthew Pickford. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

VII. SECTION-BY-SECTION ANALYSIS, S. 1994, AS AMENDED

Section 1. Short title

This Act is titled the "Combined 8(a) and HUBZone Priority Preference Act."

Section 2

This section amends Section 3(p) of the Small Business Act to add paragraphs 9–13 defining the terms "best value contract," "best value factor relative importance," "contracting officer" and "8(a) HUBZone Small Business Concern."

Section 3

(a) Amends Section 8(a)(1)(D) of the Small Business Act to provide a price evaluation preference of ten percent (10%) to an 8(a) HUBZone small business concern in a competition for a best value contract with one or more 8(a) small business concerns.

(b) Amends Section 31(b)(2)(B) of the Small Business Act to provide a price evaluation preference of ten percent (10%) to an 8(a) HUBZone small business concern in a competition for a best value contract with one or more HUBZone small business concerns.

(c) Amends Section 31(b)(3) of the Small Business Act to insert subparagraph (D), establishing a twelve percent (12%) price evaluation preference for 8(a) HUBZone small business concerns in a full and open competition, unless the otherwise lowest and response offer is from a small business concern, and the price evaluation preference will be ten percent (10%).

Section 4

Amends Section 3(p) of the Small Business Act to modify the requirement in existing law that requires a HUBZone small business concern to be owned by one or more U.S. citizens. The change would permit limited non-citizen ownership so long as it does not exceed fifteen percent (15%) of the beneficial ownership of the outstanding shares of the small business concern. This change affects those small business concerns that are required to file reports with the Securities and Exchange Commission.

Section 5

(a) Amends Section 8(a)(1)(D)(i)(II) of the Small Business Act to increase the sole-source threshold by $1 million for 8(a) small business concerns for both goods and services contracts and manufacturing contracts.

(b) Amends Section 31(b)(2)(A)(ii) of the Small Business Act to increase the sole-source threshold by $1 million for qualified HUBZone small business concerns for both goods and services contracts and manufacturing contracts.

VIII. Changes in Existing Law

In the opinion of the Committee, it is necessary to dispense with the requirement of rule XXVI (12) of the Standing Rules of the Senate in order to expedite the business of the Senate.

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