

NHOA Conference 2019

Presenters: **Christine V. Williams** | Outlook Law, LLC

John Klein, Small Business Administration

Your Presenter: Christine V. Williams

- Managing Partner and Founder Outlook Law, LLC
- Former Partner at Two International Law Firms
- Adjunct Law Professor
- SBA Board for the 10th Region-Regulatory Fairness
- SBA Award for Excellence in Advocacy
- Nationally Recognized as a Best Lawyer for 2018 and 2019



Your Presenter: John Klein

- John Klein is the Associate General Counsel for Procurement Law at the U.S. Small Business Administration. He serves as the principal legal advisor to senior Agency officials and their staffs with respect to the 8(a) Business Development program; the Agency's Government Contracting programs, including the small business set-aside, subcontracting and Certificate of Competency programs; the HUBZone program; the Small Business Innovation Research program; the Size Standards program; the Service Disabled Veteran-Owned Small Business program; and SBA's internal contracting procedures.
- Mr. Klein has been a lawyer in SBA's Office of General Counsel since 1983, serving in the Office of Legislation and the Office of General Law before becoming the Associate General Counsel for the Office of Procurement Law in 2000.
- Mr. Klein is also the SDO for the SBA.



Topics: HUBZone Overview,
Category Management, and
Upcoming Regulations

- Questions Welcome
- Interactive Session

HUBZone-Eligibility

- Principal Place of Business located in a HUBZone
- 35 Percent of the employees of that business residing in one or more HUBZones
- Areas Defined:
 - Low Income Level
 - High Poverty
 - High Unemployment Rates
 - Indian Reservations
 - Closed Military Bases or Disaster Areas

Intention of the Overhaul-FR 54812

- Last two decades is the lack of stability and predictability for program participants
- HUBZone changes at different times due to economic data
- Ripples through planning and development
- “Once certified, it is unrealistic to expect a business concern or employee to relocate in order to attempt to maintain the concern’s HUBZone status
- The Rule proposes changes that will help the HUBZone program achieve its intended results-investment in communities and continued employment

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

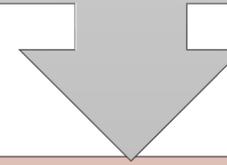
Definition: Attempt to Maintain: Current

- 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

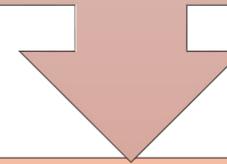
Definition: Attempt to Maintain: Proposed

- 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 maintain-No Gaming the system right before certification or recertification

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

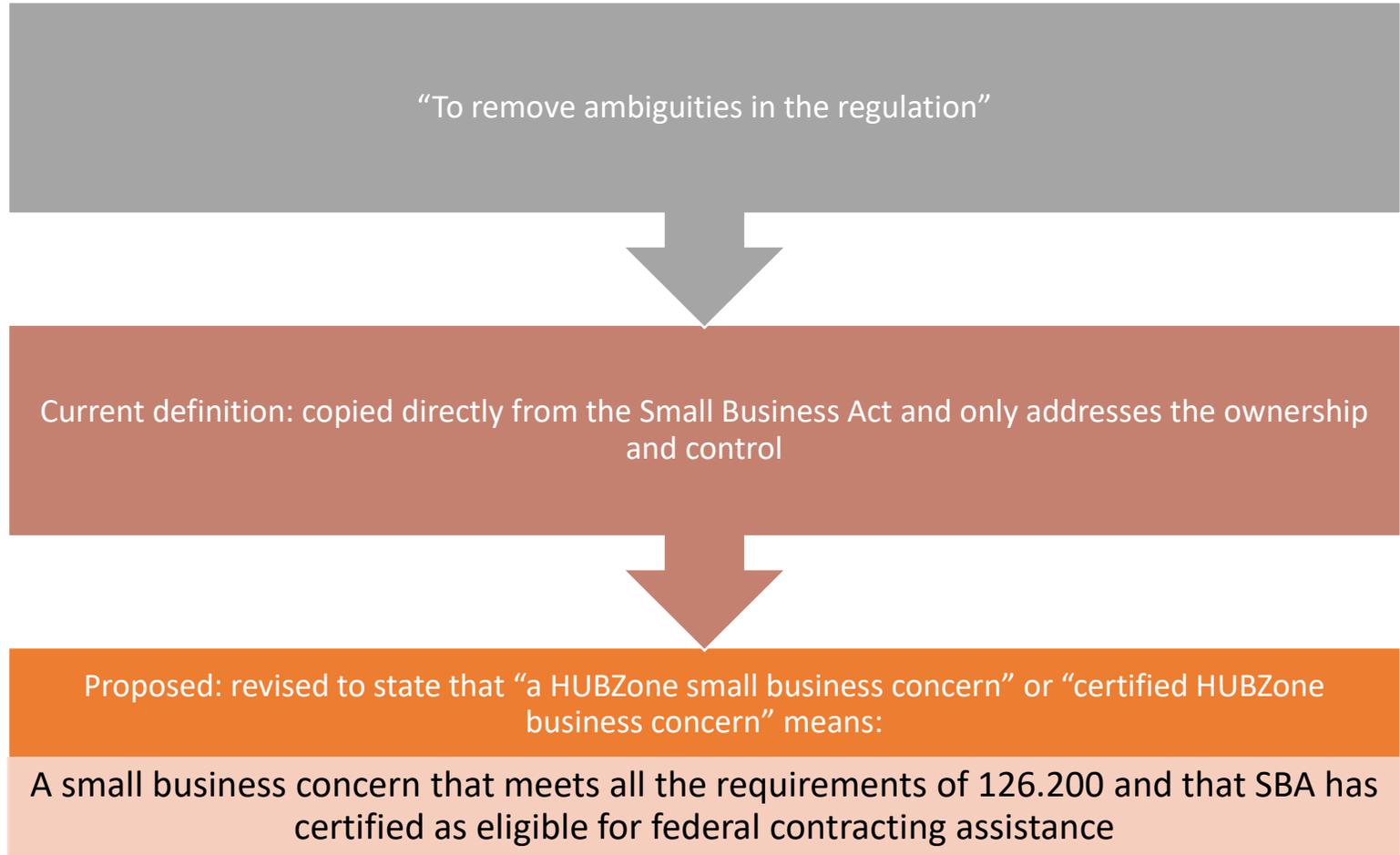


Two week pay periods-then SBA will review for the two most recently completed pay periods

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

Re-Define
HUBZone
Small
Business
Concern





Replace qualified HUBZone concern
with certified HUBZone small
business concern



Reinforces that firms must apply and
be certified

NDAA 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

Reside

- Used when analyzing whether an employee should be considered a HUBZone resident
- SBA proposes to remove the reference to primary residence, to eliminate the requirement of demonstration of living somewhere indefinitely and provide clarifying examples

Determining principal office-SBA counts all employees of the concern, other than those who work at jobsites

This includes both HUBZone and non-HUBZone residents

Not just HUBZone employees counted in determining principal office

Category Management

AMJ	1,824	20,349,000
EJK	3,685	20,980,000
HPL	1,644	14,791,000
KEE	687	14,741,000
MAN	8,547	14,200,000
QOP	4,652	13,499,000
TKR	890	24,977,000
WFO	4,280	74,052,000
AWO	2,424	27,419,000

AMJ	HJR	WVE	PLD	BBR	GRY	WY
1,822	20,349	890	6,350	10,985	445	6,800
(-2%)	(+58%)	(+20)	(+200)	(+58%)	(+7%)	(+17%)
MBC	LJH	HJR	POH	NFR	UGH	ORU
3,405	9,542	2,409	7,654	4,522	1,432	3,652
(+21%)	(+28)	(+20)	(+14%)	(+122)	(+54)	(+18)
YBY	GAN	WML	BT	FLM	CCR	CRS
3,204	5,211	7,100	7,100	782	1,901	3,280
(+23)	(+154)	(+48)	(+198)	(+74)	(+120)	(+78)
WFF	WFF	HJM	SLC	LSD	SDH	WVS
2,712	12	134	2,022	431	4,287	12,906
(+12)	(+2)	(+5)	(+18)	(+48)	(+57)	(+2)

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

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)

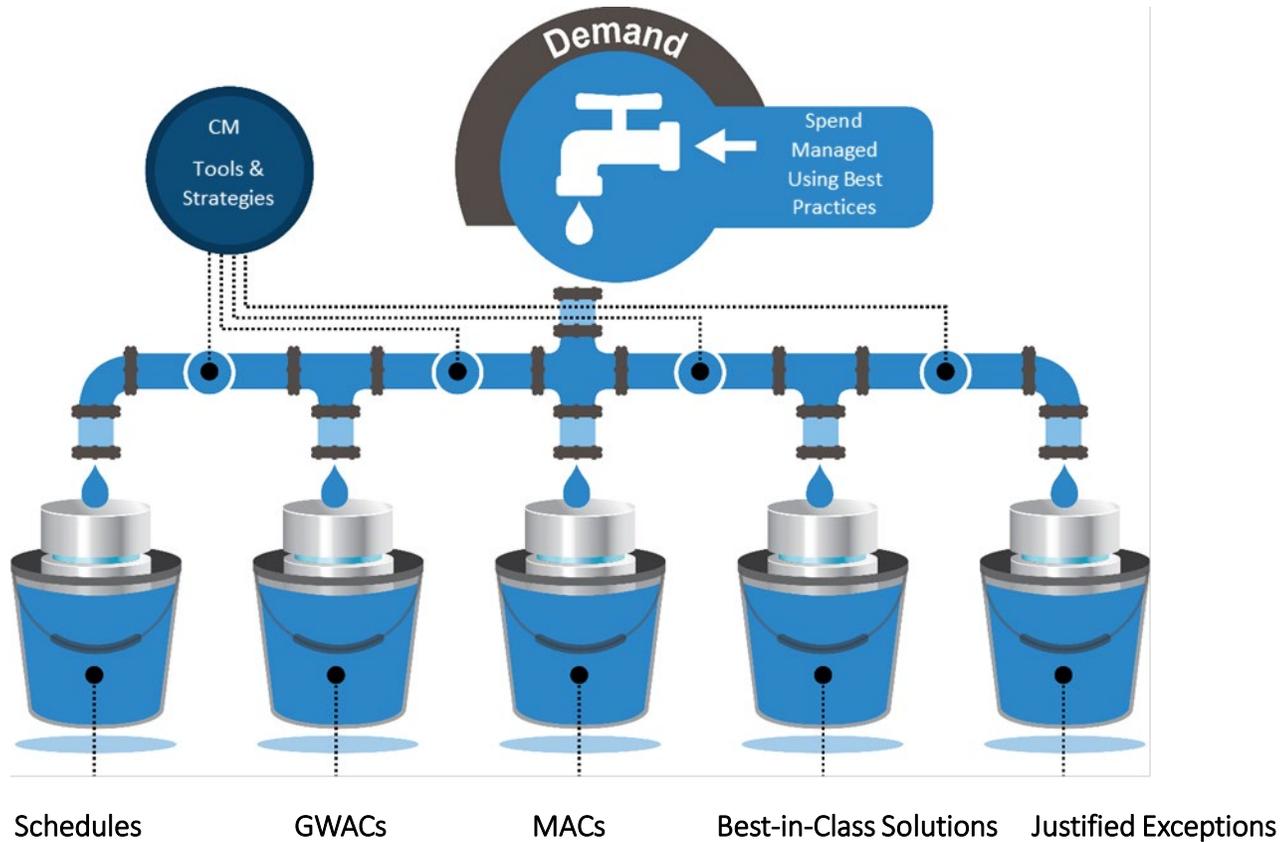
Common Government Spend Categories 1-10 (total FY 2014 spend \$275B)

1. IT – \$49.9B 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 – \$61.9B 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 – \$5.5B 3.1 Security Animals & Related Services 3.2 Security Systems 3.3 Security Services	4. Facilities & Construction - \$75.7B 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 - \$10.5B 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 5.6 Install/Maintenance/Repair/Rebuild 5.7 Basic Materials 5.8 Oils, Lubricants, and Waxes
6. Office Management - \$1.9B 6.1 Office Management Products 6.2 Office Management Services 6.3 Furniture	7. Transportation and Logistics Services – \$26.8B 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 - \$2.7B 8.1 Passenger Travel 8.2 Lodging 8.3 Travel Agent & Misc. Services	9. Human Capital - \$4.1B 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 - \$36.0B 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 11.1 Aircraft 11.2 Land Combat Vehicles 11.3 Ships & Submarines 11.4 Space	12. Weapons & Ammunition - \$15.1B 12.1 Ammunition & Explosives 12.2 Fire Control 12.3 Guided Missiles 12.4 Guns 12.5 Nuclear Ordnance 12.6 Weapons	13. Electronic & Communication Equipment - \$8.7B 13.1 Communication Equipment 13.2 Detection & Coherent Radiation 13.3 Equipment 13.4 Electrical and Electronics Equipment 13.5 Night Vision Equipment	14. Sustainment S&E - \$22.7B 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. Clothing, Textiles & Subsistence S&E - \$7.5B 15.1 Subsistence 15.2 Textiles, Clothing & Equipage
16. Miscellaneous S&E - \$839M 16.1 Non-Food Items for Resale 16.2 S&E Not Classified Elsewhere	17. Research and Development - \$40.0B 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. Equipment Related Services - \$16.5B 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. Electronic Communication Services - \$418M 19.1 Equipment Maintenance 19.2 Equipment Leases	Note: Spend figures are based on FY14 FPDS data.





Major CM Vehicles Being Used by the Government

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.



The History

- In 2005, Federal Strategic Sourcing, what would later become a subcategory of CM, was introduced.
- This was a contract management tool with limited reach. It was not a procurement policy dictating the considerations given for Government procurement.
- Strategic Sourcing grew in popularity and the Strategic Sourcing Leadership Council (SSLC) was formed.
- The SSLC would later become the Category Management Leadership Council (CMLC), in which SBA would have no vote or clear influence; effectively negating an entire agency that oversees an economic driver of the American economy.

Small Business Administration (SBA)

1

The U.S. Small Business Administration's (SBA) vote was removed from the Category Management Leadership Council (CMLC) and the SBA is no longer listed as a key agency in any decision-making process for CM vehicles.

2

During this process from 2005 until the present, SBA small business contracts were designated as “not a mandatory.” CM /vehicles are considered “mandatory” by the agencies in implementing the policies.

Governmental Category Management Leadership Council (CMLC)



Agencies are internally setting up policies and objectives that focus on strategic sourcing through CM vehicles; in effect establishing an internal CM focus and management council within each key agency.



This internal council sends a representative to the CMLC.



The CMLC Principals, which play an important role in shaping the direction of the effort, consists of representatives from the DoD, DoE, HHS, DHS, VA, GSA, and NASA.



The Category Managers for the Super 10 represent the following agencies: (OMB); (GSA), (DHS); (OPM); DoD, and the VA.



The head of each of the 24 Chief Financial Officer Act departments and agencies have designated a CMLC Lead, who coordinates their agency's participation in governmentwide category management efforts.

Potential Solutions

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.

Super Categories

Separate buckets and often times contracts that are easily combined and maintain "small" status are being taken from the competition between small business, with each category being placed on a large vehicle that has restricted competition according to the respective category/bucket



If a business is not accepted on the vehicle during its limited on-ramp period for a specific category, it remains idling by – unable to compete for the contracts placed on the vehicle.



As a result, the Government is left with fewer contractors to bid on a project, small or otherwise, thereby restricting competition.



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.



EXECUTIVE OFFICE OF THE PRESIDENT OFFICE OF
MANAGEMENT AND BUDGET
WASHINGTON, D. C . 20503

DEPUTY DIRECTOR
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SUBJECT: Category Management

Footnote 31, Page 28

- In addition to suitability considerations, agencies could not migrate work that would cause the agency to violate small business program requirements, such as taking away work from a contractor under the section 8(a) business development program without seeking release from SBA.

A close-up photograph of a person's hand holding a red pen, writing in a notebook. The notebook page is filled with handwritten text in black ink, with several words and phrases highlighted in red. The text is somewhat blurry but appears to be a list or a set of notes. In the background, a smartphone is visible on a wooden desk. The overall scene suggests a student or professional working on a document or taking notes.

New Regulations Coming



Questions?
