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[DATE]

[AGENCY]

RE: SBA Bona Fide Office Rule Changes for Federal Construction Contracts

Dear [NAME],

Thank you in advance for review of this letter. I am writing to you on behalf of the members of the Small Environmental Business Action Coalition, Inc. (SEBAC), www.sebac.org. SEBAC serves as a voice for the small business community providing environmental engineering, remediation and related support to the U.S. Department of Defense (DOD) and other Federal agencies throughout the country. A key part of our mission is to support and promote opportunities for small businesses by monitoring the federal government's goals, policies, and regulations regarding small business participation.

The members of the Small Environmental Business Action Coalition (SEBAC) strongly disagree with recent SBA interpretation of the Small Business Act (the Act), 15 U.S.C. § 637(a)(11) and associated application to CFR §124.501 (k). On November 16, 2020, SBA instituted new Bona Fide Office requirements as a result of this new interpretation. The new requirements which were effective immediately and retroactively cost small business construction firms millions of dollars.

Nationally, SEBAC represents the majority by market share of environmental remediation businesses under the NAICS code 562910. SEBAC offers a combined industry voice for small businesses many of which perform construction as part of environmental remediation, heavy civil construction, and construction NAICS codes. The broad application of this rule change greatly impacts our membership's ability to develop as small businesses, especially our members who are 8(a) certified, minority owned businesses. Further, it hinders federal agencies' procurement of construction related contracts.

Additionally, our membership has communicated to us that various SBA Districts are incorrectly interpreting this rule to include ALL NAICS Codes, including Environmental Remediation 562910, not just the Construction Codes. We would ask SBA to please clarify to your Districts that the rule only applies to Construction NAICS Codes.

Impacts to SEBAC Membership

This new interpretation of a statutory provision (15 U.S.C. § 637(a)(11)) replaces an interpretation that had been in place and in effect for years, if not decades. The 'new regulation' read out words contained in the statute—the words that a bona fide office shall only be required to the "maximum extent practicable." In omitting critical statutory language, and in doing so removing the power from the contracting officer to determine when such an office is needed, the SBA contravened clear statutory language and reversed its own accepted practice.

Now, under this rule change, our membership must establish new regional offices to be awarded construction contracts. This applies to new contract awards, follow-on contract awards, and existing task order-based contracts. SBA further applied this rule to contracts not yet awarded including active procurements. SBA's actions could potentially cost our members millions of dollars through cancelled contract actions, office establishment, and employee transfers or new hires.

The rule is antiquated and does not take into account the modern construction firm nor operating a small business during a global pandemic. SBA disregarded these two aspects in its interpretation of the rule and further hurt construction small business during an unprecedented crisis. It is common practice for any construction firm to have regional operations managed from an employee's home office, a co-working space, or a job site trailer. SBA's checklist and SOP does not allow any flexibility for the type of office required by this rule. Further, SBA did not consider the major shift to working from home during the COVID 19 pandemic. By changing this regulation in November 2020, SBA required construction small businesses and our membership to violate CDC, state, and local regulations. Not only did this hurt our member's businesses, it put their employees, families, and communities at great risk to contract a deadly virus.

The rule change unfairly targets minority owned businesses. 15 U.S.C. § 637(a)(11) applies to construction contracts awarded by SBA. SBA primarily only awards sole source and competitive construction contracts to 8(a) program participants. Nearly, ALL 8(a) certified construction firms are owned by a minority individual or group. Since the rule only applies to minority owned construction firms, the statute clearly is in direct conflict with the goals of the SBA's 8(a) Business Development Program and the Small Business Act.

Impacts to Federal Agencies

Nearly every federal agency uses the 8(a) program to award sole source and competitive construction contracts. Many agencies have existing Multiple Award Task Order Contracts (MATOCs) already in place for 8(a) contractors. The rule change greatly reduces the ability of federal agencies to award 8(a) construction contracts including task orders under an existing MATOC.

The retroactive nature of the rule change cost agencies significant taxpayer dollars and the amount will only increase. Many procurements were in progress and required agencies to cancel the procurement. For MATOCs, agencies may need to cancel existing contracts and re-compete the MATOC. Many agencies are just now coming to terms with this new requirement and have not evaluated the complete impact.

The bona fide office rule places further procurement restrictions on contracting officers and removes their ability to develop an appropriate procurement strategy for each project. Every federal agency will likely see construction project delays and escalating project costs without a change to this rule.

Ultimately, this rule change will impact federal agency missions by delaying facility sustainment, restoration, modernization (SRM) and new construction projects.

Summary

SEBAC strongly disagrees with SBA's rule change regarding the bona fide office requirement. Immediately, we are asking SBA to postpone the application of this rule change until the global

pandemic is over. In the meantime, we request SBA allow an open comment period to consider the application of the bona fide office in a modern construction industry.

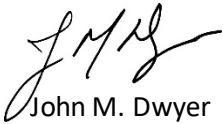
In addition to SBA's actions, we are asking Congress to remove 15 U.S.C. § 637(a)(11) statute from the Small Business Act. Further, we ask Congress to include legislation that prohibits unfair regulations on minority owned small businesses.

SEBAC asks our agency partners to support and participate in removing the bona fide office requirement from law. We are also asking our agencies to seek waivers from the rule during the global pandemic and until SBA can provide clear, consistent application of the rule.

Thank you in advance for your review of this correspondence. I would kindly ask that you provide an acknowledgement of this letter. Please do not hesitate to contact the undersigned if I can be of any further service or provide additional information in support of our position on this matter.

We look forward to engaging you in a dialogue.

Respectfully,



John M. Dwyer
President
SEBAC