



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

Acquisition Bulletin No. 23-03
Deviation No. 2023-00003

Date: August 29, 2023

MEMORANDUM FOR TREASURY ACQUISITION PERSONNEL

FROM: NICOLE EVANS *Nicole Evans*
DEPUTY ASSISTANT SECRETARY FOR ACQUISITION
SENIOR PROCUREMENT EXECUTIVE

SUBJECT: Class Deviation No. 2023-00003 from the Federal Acquisition Regulation (FAR) Verification of Eligibility for the 8(a) Program

1. **PURPOSE:** To implement a court injunction issued by the United States District Court for the Eastern District of Tennessee on July 19, 2023, enjoining the use of the rebuttable presumption of social disadvantage in administering the Small Business Administration's (SBA) business development program (8(a) Program), and SBA's memorandum issued on August 18, 2023. Accordingly, this policy memorandum establishes deviations from FAR 19.804-3 and 52.219-18 and makes necessary policy changes to the guidance in the Treasury-SBA Partnership Agreement.
2. **EFFECTIVE DATE:** Upon issuance.
3. **EXPIRATION DATE:** Until superseded or otherwise rescinded.
4. **POLICY:**
 - a. Effective immediately, Contracting Officers shall:
 - i. Use the procedures in this class deviation to verify a concern's eligibility for the 8(a) Program in lieu of using the System for Award Management or presuming acceptance of a requirement by the Small Business Administration (SBA) prior to making an award under the 8(a) Program; and
 - ii. Use the attached deviation clause **52.219-18, Notification of Competition Limited to Eligible 8(a) Participants (Class Deviation 2023-00003)**, in lieu of the clause at FAR 52.219-18, Notification of Competition Limited to Eligible 8(a) Participants.

- b. Notwithstanding FAR 19.804-3 and the SBA and Treasury 8(a) Partnership Agreement, Contracting Officers shall not make an award to an 8(a) participant unless:
- i. They receive from SBA an eligibility determination for the 8(a) participant including an 8(a) partner to a joint venture;
 - ii. The apparently successful offeror provides a copy of the SBA qualification letter for the 8(a) participant including an 8(a) partner to a joint venture; or
 - iii. They document that the 8(a) participant (including an 8(a) partner to a joint venture) appears on the SBA's "8(a) Social Disadvantage Qualification List"¹ which is updated daily and available for government-only review on the OMBMAX platform at [SBA OPPL Collaboration Page - Small Business Administration - MAX Federal Community](#).
- c. This restriction applies to the following actions:
- i. Competitive or sole-source 8(a) contract
 - ii. 8(a) sole-source orders placed against existing or new 8(a) set-aside multiple-award contracts, including Governmentwide acquisition contracts (GWACS) and Federal Supply Schedule (FSS) contracts.
 - iii. 8(a) orders placed against existing or new non-8(a) set-aside multiple-award contracts, including GWACS and FSS contracts.
 - iv. 8(a) orders under blanket purchase agreements or basic ordering agreements.
 - v. Out-of-scope modifications and unpriced options under existing 8(a) contracts.
- d. Except as noted above, existing 8(a) contracts are not impacted by this class deviation, and Contracting Officers may award in-scope modifications and exercise priced options without obtaining SBA acceptance or requiring the contractor to provide a copy of the SBA qualification letter, unless verification of eligibility would otherwise be required (see FAR 19.812(d)). In addition, Contracting Officers may place competitive 8(a) orders against existing 8(a) set-aside multiple-award contracts, GWACS, and FSS contracts without obtaining SBA acceptance or requiring the contractor to provide a copy of the SBA

¹ SBA is maintaining an "8(a) Social Disadvantage Qualification List" of participants that are eligible for award for one of three reasons: (1) SBA has made an affirmative determination that the individual-owned small business participant is socially disadvantaged; (2) The small business participant did not use the rebuttable presumption of social disadvantage and does not require affirmation; or (3) The participant is an entity-owned business and therefore affirmation is not required.

qualification letter.

- e. The restrictions in this class deviation do not apply to 8(a) entity-owned businesses owned by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations.
5. **BACKGROUND:** This memorandum and the FAR class deviation are in response to the recent court decision in *Ultima Services Corporation vs. USDA et al.*² and SBA guidance issued Friday, August 18, 2023, and supplemented on Friday, August 25, 2023.

The SBA Memorandum requires that, before an award can be made to an individual-owned small business participant that previously relied on a presumption of social disadvantage to support its eligibility, SBA must make an affirmative determination that the individual upon whom eligibility is based has established personal social disadvantage without the presumption. When required, SBA will make their affirmative determination of eligibility as a part of the offer and acceptance process.

6. **DEVIATION:** See attached
7. **ADDITIONAL INFORMATION:** The primary point of contact for this Acquisition Bulletin is Steve Kvalevog who can be reached at Steven.Kvalevog@treasury.gov.

Attachments:

- FAR 19.804-3(a) Deviation
- FAR 52.219-18 Deviation
- SBA Memorandum, “Impact of Recent Court Decision (*Ultima Servs. Corp. v. Dep’t of Ag. (E.D. Tenn.)*) on the use of the 8(a) Program,” August 18, 2023
- SBA Memorandum, “Continued Use of the 8(a) Program During the Ultima Injunction: Frequently Asked Questions,” August 25, 2023

² SBA regulations allow applicants to be admitted to the 8(a) program using a “rebuttable presumption” that certain groups are socially disadvantaged, while other entities could submit a narrative demonstrating social disadvantage which SBA would review to determine if they were also socially disadvantaged. Social disadvantage and economic disadvantage are components of 8(a) program participant eligibility. In response to a challenge that the “rebuttable presumption” violated constitutional rights to equal protection, the Court enjoined SBA from using the “rebuttable presumption” in administering the 8(a) program.

Attachment 1 - Deviation to FAR Text

Baseline is accurate through FAC 2023-05, to be effective September 22, 2023.
Changes to baseline shown as **[bolded, bracketed additions]** and ~~struck through deletions~~.
FAR text unchanged shown as asterisks.

Part 19 - Small Business Programs

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Subpart 19.8 - Contracting with the Small Business Administration (The 8(a) Program)

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19.804 Evaluation, offering, and acceptance.

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19.804-3 SBA acceptance.

(a) Upon receipt of the contracting office's offering letter, SBA will determine whether to accept the requirement for the 8(a) program. SBA's decision whether to accept the requirement will be transmitted to the contracting office in writing within 10 working days of receipt of the offer if the contract is likely to exceed the simplified acquisition threshold and within two working days of receipt if the contract is at or below the simplified acquisition threshold. The contracting office may grant an extension of these time periods, if requested by SBA.

(1) For acquisitions exceeding the simplified acquisition threshold, if SBA does not respond to an offering letter within ten working days, the contracting office may seek SBA's acceptance through the Associate Administrator for Business Development. The contracting office **[must receive SBA's decision of acceptance before proceeding with award of an 8(a) contract]** ~~may assume that SBA has accepted the requirement into the 8(a) program if it does not receive a reply from the Associate Administrator for Business Development within five calendar days of receipt of the contracting office's request.~~

(2) For acquisitions not exceeding the simplified acquisition threshold, **[the contracting office must receive SBA's decision of acceptance before proceeding with award of an 8(a) contract]** ~~when the contracting office makes an offer to the 8(a) program on behalf of a specific 8(a) participant and does not receive a reply to its offering letter within two working days, the contracting office may assume the offer is accepted and proceed with award of an 8(a) contract.~~

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Attachment 2

Class Deviation 2023-00003 Verification of Eligibility for the 8(a) Program
Changes are indicated by a change bar in the right-hand margin.

**52.219-18 Notification of Competition Limited to Eligible 8(a) Participants
(DEVIATION 2023-00003).**

The contracting officer shall insert the following clause in competitive solicitations and contracts when the acquisition is accomplished using the procedures of FAR 19.805. This deviation incorporates the guidance in Department of the Treasury Acquisition Regulation (DTAR) 1019.811-3(d)(3) to use substitute language for the paragraph (c) in FAR 52.219-18. Use the following clause with its Alternate I when competition is to be limited to 8(a) participants within one or more specific SBA districts pursuant to FAR 19.804-2.

**NOTIFICATION OF COMPETITION LIMITED TO ELIGIBLE 8(A) PARTICIPANTS
(AUG 2023) (DEVIATION 2023-00003)**

(a) Awards will only be made to—

(1) Small business concerns that are expressly certified by the Small Business Administration (SBA) for participation in SBA's 8(a) program and which meet the following criteria at the time of submission of offer—

- (i) The Offeror is in conformance with the 8(a) support limitation set forth in its approved business plan; and
- (ii) The Offeror is in conformance with the Business Activity Targets set forth in its approved business plan or any remedial action directed by SBA;

(2) A joint venture, in which at least one of the 8(a) program participants that is a party to the joint venture complies with the criteria set forth in paragraph (a)(1) of this clause, that complies with [13 CFR 124.513\(c\)](#); or

(3) A joint venture—

- (i) That is comprised of a mentor and an 8(a) protégé with an approved mentor-protégé agreement under the 8(a) program;
- (ii) In which at least one of the 8(a) program participants that is a party to the joint venture complies with the criteria set forth in paragraph (a)(1) of this clause; and
- (iii) That complies with [13 CFR 124.513\(c\)](#).

(b) By submission of its offer, the Offeror represents that it meets the applicable criteria set forth in paragraph (a) of this clause.

(c) Any award resulting from this solicitation will be made directly by the contracting officer to the successful 8(a) offeror selected through the evaluation criteria set forth in this solicitation.

(End of clause)

Alternate I (MAR 2023). If the competition is to be limited to 8(a) participants within one or more specific SBA regions or districts, add the following paragraph (a)(1)(iii) to paragraph (a) of the clause:

(iii) The offeror's approved business plan is on the file and serviced by
__ *[Contracting Officer completes by inserting the appropriate SBA District
and/or Area Office(s) as identified by the SBA]*



Memorandum

Date: August 18, 2023

To: Federal Chief Acquisition Officers & Senior Procurement Executives

From: Dr. Donna Peebles

Associate Administrator, Office of Business Development
Small Business Administration

Subject: Impact of Recent Court Decision (*Ultima Servs. Corp. v. Dep't of Ag.* (E.D. Tenn.)) on the use of the 8(a) Program

Background

On July 19, 2023, a district judge enjoined the Small Business Administration (SBA) "from using the rebuttable presumption of social disadvantage in administering" the 8(a) Business Development Program (8(a) Program). *Ultima Servs. Corp. v. Dep't of Ag.*, No. 20-cv-0041 (E.D. Tenn.). The rebuttable presumption assumes, unless there is evidence to the contrary, that members of certain racial and ethnic groups qualify as socially disadvantaged within the meaning of the 8(a) Program requirements. See 13 C.F.R. § 124.103(b). The Court held that the SBA's use of the rebuttable presumption violated the plaintiff's Fifth Amendment right to equal protection of the law.

On August 31, the Court will hold a hearing on its ruling and may provide additional direction to SBA. SBA, in conjunction with the Department of Justice (DOJ), has prepared the following interim guidance for agencies to follow. This guidance may be updated as necessary based on any further developments at or after the August 31 hearing.

Guidance for Federal Agencies

This guidance is intended to address:

1. Which 8(a) Program participants are impacted by this decision;
2. How federal agencies may continue to issue 8(a) contract awards during this critical period of the end of the fiscal year; and
3. The impact on existing contracts with 8(a) Program participants.

We note that SBA and DOJ are not interpreting the injunction to limit contract awards to 8(a) participants executed outside the 8(a) Program authority; 8(a) participants remain eligible for

other types of prime contracts, including unrestricted, small business set-aside, and other socio-economic procurements.

Categories of 8(a) Participant Impacted by this Injunction

There are three categories of 8(a) Program participants:

1. Individual-owned small businesses which used the rebuttable presumption of social disadvantage to establish eligibility;
2. Individual-owned small businesses which did not use the rebuttable presumption of social disadvantage and therefore have already provided SBA with documentation to establish social disadvantage; and
3. Entity-owned small businesses which do not have to establish social disadvantage to participate in the program (these businesses must only establish economic disadvantage at the Entity level). These entity-owned businesses are owned by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations.

SBA and DOJ do not interpret the injunction to apply either to individual-owned small businesses that previously established social disadvantage without the use of the presumption (Group 2) or to small businesses that are entity-owned (Group 3). The processing of 8(a) awards made to these two groups of 8(a) participants will not be affected.

Submission of New Requirements to the 8(a) Program

- Agencies can and should continue to submit new requirements for acceptance into the 8(a) Program. Before an award can be made to an individual-owned participant that previously relied on the presumption of social disadvantage to support its eligibility, SBA must make an affirmative determination that the individual upon whom eligibility is based has established personal social disadvantage without the presumption.
- Agencies can immediately continue to send offering letters to SBA. Until the new process outlined below is in place, SBA will process individual claims of social disadvantage under the existing (narrative) process. SBA has already done that in several instances and turned those cases around within only a few days.
- For sole source 8(a) awards, the procuring agency typically offers the procurement on behalf of a specific 8(a) nominee. SBA will verify the nominee's eligibility for award as part of its acceptance of the procurement into the 8(a) Program. SBA will verify that the nominee meets the social disadvantage requirement in connection with its acceptance.
- For competitive 8(a) awards, the procuring agency will request an eligibility determination of the identified apparent successful offeror or offerors. SBA will verify

that the nominee(s) meets the social disadvantage requirement in connection with the contract eligibility determination.

- SBA anticipates that it should be able to complete this process and, if social disadvantage is established, to authorize the award in 5 business days.
- If the business owner cannot establish social disadvantage as part of this new process, SBA will not be able to reconsider the business owner's eligibility for this specific proposed award due to operational constraints. The requesting agency will be required to award the requirement to a different 8(a) firm that has established social disadvantage without reliance on the presumption or award the contract through an alternative means.
- We understand that some agencies have partnership agreements with SBA that authorize the agency to deem procurement requirements offered to the 8(a) Program as accepted based on SBA's inaction. As a result of the injunction, agencies may not rely on SBA inaction as approval. For individual-owned participants, agencies may not proceed to finalizing a contract with the participant until SBA has affirmatively indicated that the individual-owned participant has demonstrated its social disadvantage.
- As referenced above, awards to individual-owned participants which did not rely on the rebuttable presumption to establish social disadvantage and awards to entity-owned participants may proceed as usual.
- SBA will communicate directly to existing 8(a) participants the method and procedures for establishing social disadvantage. This communication will take place on Monday, August 21, 2023.
- Acquisition personnel should expect to see a letter from SBA which indicates the identified 8(a) participant meets the social disadvantage requirements. This letter will minimally contain the 8(a) participant business name, Unique Entity ID (UEI), Program entrance date, and anticipated Program exit date.
- Consistent with existing regulations, SBA's initial determination of social disadvantage will continue to form the basis of continued eligibility determinations. In other words, once a firm has demonstrated social disadvantage via the new process, SBA will not ask firms to complete the new process again with respect to a different contract award.

Existing Contracts and Options/Modifications with 8(a) Participants

Contracts that were placed into the 8(a) Program prior to July 19, 2023, are not affected by the injunction. Performance on such contracts, as well as most future actions such as issuing priced options and in-scope modifications, may continue as usual.

As explained above, however, if an eligibility determination is required in connection with an 8(a) contract to an individual-owned participant, SBA must make an affirmative finding of

social disadvantage. Agencies cannot deem SBA to have made that determination through inaction and instead should await affirmative confirmation from SBA.

Where a contracting action under a previously awarded 8(a) contract or agreement requires SBA acceptance, including an 8(a) sole source order awarded against an 8(a) Multiple Award Contract (MAC) or Governmentwide Acquisition Contract (e.g., STARS III), a discretionary 8(a) task order competed against a non-8(a) MAC, or call orders placed against Blanket Purchase Agreements or Basic Ordering Agreements, SBA will determine the qualifying individual's social disadvantage in accordance with the procedures above.

Conversely, the injunction does not affect contracting actions under previously awarded 8(a) contracts or agreements which do not require SBA acceptance, including in-scope modifications and competitively awarded task orders under 8(a) MACs and GWACs. For these actions, SBA will not make an eligibility determination and agencies should continue to execute these as normal.

Replacing one 8(a) participant with another 8(a) participant (novating) on an 8(a) contract is considered a new contracting action to the firm receiving the award. As such, SBA will assess whether the receiving firm meets the social disadvantage requirement in connection with the novation.

Further Information Regarding SBA Activities

SBA has temporarily suspended the initiation of new applications into the 8(a) Program and suspended the final evaluation of all pending applications that sought to rely on the rebuttable presumption. SBA is currently updating its new applicant process and system to comply with the Court's order. SBA anticipates that the new application process and system changes will be completed soon. At that time, the agency will reopen the new application process and resume making final evaluation determinations.

Questions

Questions from the acquisition community regarding this guidance should be directed to 8aquestions@sba.gov. Please use "Memo on Recent Court Decision Question" as the subject to assist with routing.

[8/25/23]

Continued Use of the 8(a) Program During the Ultima Injunction

Frequently Asked Questions

The questions and answers in this document are intended to help the federal workforce as it implements SBA's guidance on the impact of the district court's July 19, 2023 decision in *Ultima Servs. Corp. v. Dep't of Ag.* (E.D. Tenn.) on the 8(a) Program. These FAQs may be updated based on further developments. Additional questions may be sent to 8aquestions@sba.gov, with "8.25 FAQs" as the subject line.

A. New requirements

1. Does the guidance require agencies to pause or otherwise slow their submission of new requirements for acceptance into the 8(a) Program?

No. Under the guidance, agencies can and should continue to submit new requirements for acceptance into the 8(a) Program.

2. Are all new 8(a) requirements subject to an affirmative determination by SBA prior to award that social disadvantage has been established without the presumption?

No. The *Ultima* injunction does not apply either to individual-owned small businesses that previously established social disadvantage without the use of the presumption or to small businesses that are entity-owned, which do not have to establish social disadvantage to participate in the program. Entity-owned small businesses include business concerns owned by Alaska Native Corporations, Indian tribes, Native Hawaiian Organizations, or Community Development Corporations (CDCs). SBA is publishing and updating a MAX.gov list of the 8(a) participants that fall into these categories. The processing of 8(a) awards made to these businesses will not be affected.

3. Is there a list of small businesses in the 8(a) program that have established social disadvantage without the use of the presumption which currently qualify for awards under 8(a) authorities?

SBA is making a list available for government-only review within OMB's MAX.gov platform. The MAX.gov list includes both individual-owned 8(a) participants and entity-owned participants. SBA also will send a letter to every current Program Participant that it has identified as having established its individual social disadvantage and entity-owned businesses which do not have to establish social disadvantage in response to this injunction. This will include Participants that established their individual social

disadvantage at the time of their application to the program and those that have established their individual social disadvantage in response to the *Ultima* decision. All Participants will be able to share that letter with procuring agencies before an 8(a) award occurs.

4. Are competitive 8(a) set-aside orders conducted under an existing 8(a) multiple award contract or government-wide acquisition contract with individual-owned small businesses subject to an affirmative determination of eligibility by SBA prior to award?

No. Eligibility for a competitive 8(a) order under an existing 8(a) multiple award contract or an 8(a) government-wide acquisition contract flows down from the underlying contract. Agencies do not offer and SBA does not accept individual orders into the 8(a) program. SBA does not make a new eligibility determination with respect to such orders.

Agencies may compete orders amongst 8(a) contractors, at any dollar level, when using the 8(a) MAS Pool on the GSA Federal Supply Schedule and when using GSA's government-wide IDIQs for 8(a) firms, including GSA's 8(a) STARS III GWAC, without affirmation of eligibility from SBA prior to award. More than 1,100 8(a) contractors are qualified to compete on the STARS GWAC and provide a wide range of IT services. These order awards do not require eligibility determinations by SBA.

Note that for competitive 8(a) awards outside of 8(a) ordering vehicles (e.g., an 8(a) competitive order under a multiple award contract that is not itself an 8(a) contract), the procuring agency must request an eligibility determination of the identified apparent successful offeror or offerors. SBA will verify that the nominee(s) meets the social disadvantage requirement in connection with the contract eligibility determination. This does not apply to awards that are made to 8(a) participants after full and open competition.

5. If an agency seeks to place a directed (sole source) award with an individual-owned small business – either on the open market or on an existing government-wide or agency contract – must SBA first verify the nominee's eligibility for award as part of its acceptance of the procurement into the 8(a) program?

Yes. For every sole source 8(a) award, SBA must verify that the nominee meets the social disadvantage requirement in connection with its acceptance. This includes the award of any 8(a) sole-source order, regardless of whether the underlying contract is an 8(a) contract.

B. Existing requirements

6. Must SBA make an affirmative determination of eligibility regarding ongoing contracts with individual-owned small businesses?

For any contract placed into the 8(a) Program prior to July 19, 2023 (the date of the *Ultima* injunction), agencies may allow continued performance under the existing contract period, exercise priced options, and execute in-scope modifications without consulting with SBA.

7. If a contract was placed in the program after July 19, 2023, may an agency exercise a priced option or execute an in-scope modification without first receiving affirmation from SBA regarding the business' eligibility?

If a contract was placed into the program after July 19, 2023, it must either be awarded to a firm that doesn't need a social disadvantage determination (i.e., entity-owned Participants, or individual-owned Participants that previously established their personal social disadvantage in their application to participate in the program) or to one whose social disadvantage has been affirmatively determined by SBA prior to award. In either case, as with 8(a) contracts existing prior to July 19, 2023, agencies may allow continued performance under the existing contract period, exercise priced options, and execute in-scope modifications without consulting with SBA.

C. Contracting with Small Disadvantaged Businesses (SDBs) outside of the 8(a) Program

8. Are there any restrictions on contracting with SDBs outside of the 8(a) program as a result of the injunction?

No. The injunction does not limit contract awards to 8(a) participants executed outside the 8(a) Program authority; 8(a) participants remain eligible for other types of prime contracts, including unrestricted, small business set-aside, and other socio-economic procurements without additional verifications.

9. How can contracting officers maximize opportunities for SDBs outside the 8(a) Program?

Agencies should consider set-asides with WOSBs (see [FAR 19.1505](#)), HUBZone small business contractors ([FAR 19.1305](#)), and SDVOSBs (see [FAR 19.1405](#)). Approximately 65 percent of certified WOSBs, HUBZone, and certified SDVOSB small business contractors also self-represent as SDBs. Small business set-asides should also be considered – historically, about 30 percent of small business set-asides are won by SDBs.

D. Reducing procurement lead-time and barriers to entry for small businesses

10. What strategies might be used when conducting competitive small business set-asides to reduce procurement lead-times and improve accessibility to the marketplace for small businesses?

[FAR 1.102-4](#) provides authority to use flexible business strategies in procurements unless noted otherwise. Sample use cases and examples of tested innovative acquisition techniques can be found in the Periodic Table of Acquisition Innovations (PTAI): <https://fai.gov/periodic-table>. More than half of the listed strategies have been demonstrated to reduce burden and facilitate access for small businesses. Agency designated [Acquisition Innovation Advocates](#) can provide additional resources.