



Office of the Procurement Executive

Acquisition Alert 23-30

TO: All Domestic and Overseas Contracting Activities

FROM: Michael W. Derrios
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SUBJECT: Class Deviation - Small Business Administration 8(a) Program Offer and Acceptance and Eligibility Verification

1. Introduction: The purpose of this Acquisition Alert is to provide a Class Deviation from the Federal Acquisition Regulation (FAR), regarding the Small Business Administration (SBA) 8(a) Program offer and acceptance, specifically deviations from [FAR 19.804-3\(a\)\(1\)](#) and [\(a\)\(2\)](#) as shown in Attachment A to this Alert. In addition, this Alert provides a deviation from Department of State Acquisition Regulation ([DOSAR 619.804-3-70\(d\)](#)) as shown in Attachment B to this Alert. Further, these deviations supersede any conflicting language in the [Department's Partnership Agreement with SBA](#) with respect to the verification of 8(a) Participant eligibility.

2. Background:

- a. Ultima v. U.S. Department of Agriculture Decision:** On July 19, 2023, a United States District Court judge enjoined the SBA "from using the rebuttable presumption of social disadvantage in administering" the 8(a) Business Development Program (8(a) Program). 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. The injunction specifically affects 8(a) Program participants that are "individual-owned small businesses which used the rebuttable presumption of social disadvantage to establish eligibility." The injunction does not affect 8(a) Program participants that are "individual-owned small businesses which did not use the rebuttable presumption of social disadvantage," or "entity-owned small businesses," such as businesses

that are owned by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations.

- b. SBA Interim Guidance:** Before an 8(a) award can be made to an individual-owned small business 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. When required, SBA will make their affirmative determination of eligibility as a part of the offer and acceptance process.

- c. Deviation Authority:** This class deviation is issued under the authority of [FAR 1.404](#) and [DOSAR 601.404](#). This class deviation is issued following consultation with the Chair of the Civilian Agency Acquisition Council (CAAC) ([CAAC Letter 2023-04](#)) in accordance with [FAR 1.404\(a\)](#).

- d. Existing Policies:**
 - (1) This Acquisition Alert supersedes any conflicting language in Senior Procurement Executive Memorandum 23-01 and the [Department's Partnership Agreement with SBA](#).
 - (2) Procurement Information Bulletin (PIB) 2018-03 was issued in June 2018 as a class deviation to change various DOSAR references from "\$150,000" to "the simplified acquisition threshold" as a result of FAR case 2018-004. The changes issued by that deviation that impact [DOSAR 619.804-3-70](#) are reflected in Attachment B herein along with the new changes issued by this Acquisition Alert.

3. Acquisition Impact:

- a. SBA 8(a) Eligibility Determination:** SBA is maintaining an 8(a) Social Disadvantage Qualification List of participants that it has determined are eligible for award because:
 - (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) an affirmation is not required for “entity-owned small businesses.”

- b. Qualification List:** The 8(a) Social Disadvantage Qualification List is available for government-only review within OMB’s MAX.gov platform on the SBA Office of Policy, Planning and Liaison Collaboration page located at [SBA - MAX Federal Community](#) (must use CAC/PIV or user ID and password to login). SBA is also sending qualification letters to every current 8(a) Program participant that is eligible for award. COs may request a copy of this qualification letter from the 8(a) firm in addition to viewing the SBA’s Qualification List. If a firm is not on the Qualification List, the CO must request SBA’s affirmative determination of eligibility using the procedures outlined herein. **NOTE:** Whether or not an 8(a) firm is on the Qualification List, COs must still follow the procedures at [FAR subpart 19.8](#) and [DOSAR 619.8](#) regarding offer and acceptance under the 8(a) Program, including the FAR and DOSAR deviations as shown in the attachments to this Alert.
- c. Department’s Partnership Agreement with SBA:** As a result of the Court’s injunction, Contracting Officers may no longer rely on SBA nonresponse to an eligibility determination as authorization to proceed with an award as allowed under the [Department’s Partnership Agreement with SBA](#). For individual-owned participants, the Department 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.
- d. Existing Contracts and Options/Modifications with 8(a) Participants:**
- (1) Contracts that were placed into the 8(a) Program prior to July 19, 2023, are not affected by the Court’s injunction. Performance on such contracts, as well as most future actions such as issuing priced options and in-scope modifications, may continue as usual.
 - (2) 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 (GWAC) (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 located on pages 2 and 3 of the [SBA Memorandum on Ultima 8\(a\) Decision](#).

- (3) 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.

4. Action Required: Contracting Officers must comply with the FAR and DOSAR deviations included in Attachments A and B herein and must adhere to the following:

- a. Contracts awarded on or after July 19, 2023, utilizing 8(a) authority, require an affirmative determination of social disadvantage by the SBA for the apparent successful offeror, regardless of dollar value, including-
 - (1) Directed or sole-source awards to an 8(a) participant, or
 - (2) Set-aside awards, partially or in whole, to 8(a) participants.
- b. For contracts awarded prior to July 19, 2023, utilizing 8(a) authority, an affirmative determination of social disadvantage by the SBA is necessary, regardless of dollar value, when-
 - (1) Exercising an unpriced option, or
 - (2) Issuing a modification in response to a novation request.
- c. For contracts awarded prior to July 19, 2023, utilizing 8(a) authority, an affirmative determination of social disadvantage by SBA is not necessary when-
 - (1) Exercising a priced option,
 - (2) Issuing an in-scope modification, or
 - (3) Awarding a competitive task order on an 8(a) MAC or GWAC.

5. Effective Date: This Acquisition Alert is effective upon issuance.

6. Expiration Date: This Acquisition Alert expires once the requirements are incorporated into the DOSAR, the Department of State Acquisition Manual (DOSAM), or are rescinded, whichever occurs first.

7. Additional Information: Questions regarding this Acquisition Alert may be directed to AcquisitionPolicy@state.gov. The Small Business Administration has also provided answers to [SBA Frequently Asked Questions on the Continued Use of the 8\(a\) Program During the Ultima Injunction](#).

8. Attachments:

- A. FAR Deviation (*included below*)
- B. DOSAR Deviation (*included below*)

9. Referenced Documents, Checklists, Guides and Templates:

- [Department's Partnership Agreement with SBA](#)
- [SBA Memorandum on Ultima 8\(a\) Decision](#)
- [SBA Frequently Asked Questions on the Continued Use of the 8\(a\) Program During the Ultima Injunction](#)

ATTACHMENT A

FAR DEVIATION

FAR Baseline is accurate through: FAC 2023-05 effective on 09/22/2023

- Additions to baseline made by deviation are indicated by **[bold text in brackets]**
- Deletions to baseline made by deviation are indicated by strikethroughs
- Five asterisks (* * * * *) indicate that there are no revisions between the preceding and following parts or sections

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 B

DOSAR DEVIATION

- Additions to baseline made by deviation are indicated by **[bold text in brackets]**
- Deletions to baseline made by deviation are indicated by strikethroughs

619.804 Evaluation, offering, and acceptance.

619.804-3 SBA acceptance.

619.804-3-70 SBA Acceptance Under MOUs for Acquisitions Exceeding [the Simplified Acquisition Threshold] ~~\$150,000~~.

(a) The SBA's decision whether to accept the requirement shall be transmitted to the contracting agency in writing within five working days of receipt of the offer.

(b) The SBA may request, and the contracting agency may grant, an extension beyond the five-day limit.

(c) SBA's acceptance letter should be faxed or e-mailed to the offering contracting agency.

~~(d) If the offering contracting agency has not received an acceptance or rejection of the offering from SBA within five days of SBA's receipt of the offering letter, the contracting agency may assume that the requirement has been accepted and proceed with the acquisition.~~

(e) The contents of the acceptance letter shall be limited to the eligibility of the recommended 8(a) contractor.