



UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer and
Assistant Secretary for Administration
Washington, D.C. 20230

PROCUREMENT MEMORANDUM 2023-11

ACTION

MEMORANDUM FOR: Senior Bureau Procurement Officials

FROM: Olivia J. Bradley
Senior Procurement Executive and
Director for Acquisition Management

SUBJECT: Federal Acquisition Regulation (FAR) Class Deviation:
Regarding the Small Business Administration (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"

Background

On July 19, 2023, the United States District Court for the Eastern District of Tennessee enjoined 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.

SBA, in conjunction with the Department of Justice (DOJ), prepared the SBA Memorandum (Attachment A) which provides interim guidance for agencies to follow. Compliance with that guidance will require agencies to deviate from certain FAR requirements for the 8(a) Program.

Purpose

This class deviation is issued in accordance with FAR 1.404 and pursuant to Civilian Agency Acquisition Council (CAAC) Letter 2023-04 to revise FAR Text at FAR 19.8 to require that, before an 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.

Required Actions

This procurement memorandum supersedes Appendix C of Commerce Acquisition Manual Chapter 1319.70, “The Partnership Agreement between The U.S. Small Business Administration and U.S. Department of Commerce for the 8(a) Business Development Program” for offer and acceptance procedures for an individual-owned small business participant that previously relied on the presumption of social disadvantage to support its eligibility.

When a contract action proposed for award as part of the 8(a) Program applies to an individual-owned small business participant that has not received an affirmative determination of social disadvantage by SBA (e.g., the entity is not on the SBA list¹), agencies should follow the procedures at FAR subpart 19.8 regarding offer and acceptance under the 8(a) Program, including the FAR deviations to paragraphs 19.804(a)(1) and (a)(2) as shown in Attachment B.

Effective Date

This deviation is effective immediately and remains in effect until rescinded or incorporated into the FAR.

Questions

Please direct any questions regarding this Procurement Memorandum to OAM_Mailbox@doc.gov.

Attachment A – SBA Memorandum

Attachment B – FAR Deviation Text

¹This list includes 8(a) participants that are entity-owned, that did not use a rebuttable presumption to gain admission, or that SBA has found to be socially disadvantaged without use of the rebuttable presumption:

<https://community.max.gov/pages/viewpage.action?spaceKey=SBA&title=SBA+OPPL+Collaboration+Page>