



CLASS DEVIATION FROM THE FEDERAL ACQUISITION REGULATION

Determination and Findings

In accordance with Civilian Agency Acquisition Council (CAAC) Letter 2023-04, "CAAC Consultation to Issue a Class Deviation From the Federal Acquisition Regulation (FAR) 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) Prog,'" the Department of Commerce is authorizing a class deviation to implement the SBA Memorandum dated August 18, 2023 (SBA Memorandum), which provides guidance to agencies in light of the injunction put in place.

Findings

- 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 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.
- The SBA Memorandum requires 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.
- Contracting officers are provided deviated language for FAR Part 19.8 including a revised Commerce Acquisition Manual Notice 2023-08 identifying instructions for complying with Appendix C of 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."

Determination

In accordance with FAR 1.404, I hereby authorize this class deviation. The areas of the FAR that are affected by this class deviation are FAR 19.804-3.

This class deviation will remain in effect until rescinded or incorporated into the FAR.

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

Date: