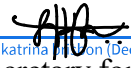




MEMORANDUM FOR: Heads of the Contracting Activities

FROM: H. Katrina Brisbon 
Deputy Assistant Secretary for the Office of Acquisitions Senior Procurement Executive

SUBJECT: Federal Acquisition Regulation (FAR) Class Deviation (2024-01) – Small Business Administration (SBA) 8(a) Program Offer and Acceptance and Eligibility Verification

- 1. EFFECTIVE DATE:** Immediately Upon Signature
- 2. EXPIRATION DATE:** This class deviation remains in effect until the statutory change is incorporated in the FAR or this deviation is rescinded.

3. PURPOSE:

This memorandum approves a class deviation from the FAR regarding SBA 8(a) Program offer and acceptance, specifically the deviations to FAR 19.804-3(a)(1) and (a)(2). This memorandum applies in lieu of the HHS and SBA Partnership Agreement (Attachment C) with respect to the verification of 8(a) Participant eligibility for the purposes of offer and acceptance.

4. BACKGROUND:

Civilian Agency Acquisition Council (CAAC) Letter 2023-04 authorizes agencies to issue 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 by a recent court decision (*Ultima Servs. Corp. v. Dep’t of Ag. (E.D. Tenn.)*).

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 B) which provides guidance for agencies to follow. Compliance with that guidance will require agencies to deviate from certain FAR requirements for the 8(a) Program.

SBA is maintaining a list of 8(a) 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.” The list is available for government-only review within OMB’s MAX.gov platform on the [SBA Office of Policy, Planning and Liaison \(OPPL\) Collaboration page](#). SBA is also sending qualification letters to every current 8(a) Program participant that is eligible for award.

The SBA maintained list of 8(a) participants that have been determined to be eligible for award is to be used by HHS contracting officers **for market research purposes only**. If required, as described in Section 5 – GUIDANCE, HHS contracting personnel must follow the SBA offer and acceptance process even if the apparent successful offeror is on the list.

5. GUIDANCE:

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, 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 A.

As a general rule, the following guidelines apply:

Major Categories of Covered Contract Actions Utilizing 8(a) Authority	Contract Action Sub-Categories (i.e., Specific Types of Actions)	Affirmative Determinations of Social Disadvantage by the SBA for the Apparent Successful Offerors are..	
		Required	NOT Required
New 8(a) Contracts and Orders (Awarded After 07/19/2023)	Directed or Sole Source 8(a) Awards	X	
	8(a) Set-aside Awards, both partially or in whole	X	
	8(a) Sole-Source Orders against Non-8(a) Multiple Award Contracts (MACs) or Governmentwide Acquisition Contracts (GWACs)	X	
	Competitive 8(a) Orders against Non-8(a) MACs or GWACs	X	
New Orders Against Existing 8(a) Awards (Awarded Prior to 07/19/2023)	8(a) Sole-Source Orders against 8(a) MACs or GWACs (e.g., STARS III)	X	
	Competitive Task Orders against 8(a) MACs or GWACs		X
	8(a) Orders against Blanket Purchase Agreements (BPAs) or Basic Ordering Agreements (BOAs)	X	

Major Categories of Covered Contract Actions Utilizing 8(a) Authority	Contract Action Sub-Categories (i.e., Specific Types of Actions)	Affirmative Determinations of Social Disadvantage by the SBA for the Apparent Successful Offerors are..	
		Required	NOT Required
Modifications to Existing 8(a) Contracts or Agreements (Awarded Prior to 07/19/2023)	To exercise <u>priced</u> options		X
	To exercise <u>unpriced</u> options	X	
	To honor novation requests	X	
	For <u>in-scope</u> changes		X
	For <u>out-of-scope</u> changes	X	

If the apparently successful offeror(s) is found to be ineligible for award based on the current qualification requirements, the contracting officer must identify an alternate 8(a) firm.

6. AUTHORITY:

This class deviation is issued under the authority of FAR 1.404 and the Department of Health and Human Services Acquisition Regulation (HHSAR) 301.401. CAAC Letter 2023-04, CAAC Consultation to Issue a Class Deviation from FAR Regarding the 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,” issued August 25, 2023 (Attachment 1) by the CAAC, constitutes consultation with the Chair of the CAAC as required by FAR 1.404(a)(1).

7. DEVIATION:

This class deviation amends the FAR text at FAR 19.804-3(a)(1) and (a)(2). The FAR Deviation text is included in Attachment A to this memorandum.

8. ATTACHMENTS:

Attachment A: FAR Deviation Text from CAAC Letter 2023-04

Attachment B: SBA Memorandum on Recent Court Decision Dated August 18, 2023

Attachment C: Partnership Agreement Between the U.S. Small Business Administration And U.S. Department of Health and Human Services for the 8(a) Business Development Program

Attachment A – FAR Deviation Text

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

Part 19 - Small Business Programs

* * * * *

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

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19.804 Evaluation, offering, and acceptance.

* * * * *

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.~~

* * * * *



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.

PARTNERSHIP AGREEMENT

Between
The U.S. Small Business Administration
and
U.S. Department of Health and Human Services for
the
8(a) Business Development Program

Executive Summary

Sections 7(j)(10) and 8(a) of the Small Business Act (the Act) (15 U.S.C. §§ 636(j)(10) and 637(a)) authorize the U.S. Small Business Administration (SBA) to establish a business development program, which is known as the 8(a) Business Development (8(a) BD) Program. The program is a nine-year program created to assist firms owned and controlled by socially and economically disadvantaged individuals. Small business concerns owned and controlled by Alaska Native Corporations (ANCs), Indian Tribes, Native Hawaiian Organizations (NHOs), and Community Development Corporations (CDCs) are also eligible to participate in the 8(a) BD Program. The SBA services all 8(a) Program Participants to provide various management, technical, financial and procurement assistance designed to strengthen their ability to compete effectively in the American economy.

The SBA partners with federal agencies to promote maximum utilization of 8(a) Program Participants to ensure equitable access to contracting opportunities in the federal marketplace. Once certified participants are eligible to receive federal contracting preferences.

Pursuant to section 8(a) of the Act the SBA is authorized to enter into all types of contracts with other Federal agencies. By statute, the SBA enters into prime contracts with procuring activities and arranges for the performance of those contracts by awarding subcontracts to eligible 8(a) BD Program Participants. Through this Partnership Agreement (PA), the SBA is delegating its contract execution functions to the procuring activity and is authorizing the **U.S. Department of Health and Human Services (HHS)** to execute and sign contracts on behalf of the SBA and contract directly with the qualified 8(a) Program Participant. The **HHS** will continue to perform all other required contract administration services. The 8(a) BD Program is governed by Part 124 of SBA regulations (13 C.F.R. part 124) and the Federal Acquisition Regulation (FAR), subpart 19.8 (48 C.F.R. § subpart 19.8).

For contracts with a duration of not more than five years awarded to an 8(a) Program Participant, including multiple award contracts (MACs) and Government-Wide Acquisition Contracts (GWACs) that are set-aside exclusively for 8(a) Participants, the firm is considered an 8(a) certified small business throughout the life of that contract, even if the firm's term of participation in the 8(a) BD Program has ended or the firm has otherwise left the 8(a) BD Program. Thus, where an 8(a) Program Participant is awarded an 8(a) MAC, the Participant may be awarded competitive orders under that 8(a) MAC even if the firm's term of participation in the 8(a) BD Program has ended or the firm has otherwise left the program. However, for any sole

source order under the 8(a) MAC, the firm must be an eligible Program Participant and must qualify as small for the applicable size standard on the date of award for the order.

In the case of MACs that were not set-aside for exclusive competition among 8(a) Participants, an agency may restrict competition for an order to eligible 8(a) contract holders if the procuring agency offers the order to the SBA and the SBA accepts it into the 8(a) BD Program. In such a case, any firm seeking to be awarded the order must be an eligible Program Participant on the initial date specified for receipt of offers contained in the order solicitation, or on the date of award of the order if there is no solicitation.

If an 8(a) Program Participant is awarded a long-term 8(a) contract (i.e., one with a duration that exceeds five years), the contracting officer must verify in the Dynamic Small Business Search (DSBS) whether the firm continues to be an eligible 8(a) Participant no more than 120 days prior to the end of the fifth year of the contract and no more than 120 days prior to exercising any option. Where the contract holder no longer qualifies as an eligible 8(a) Participant or will cease to qualify as an eligible 8(a) Participant during the 120-day period prior to the end of the fifth year of the contract, the option shall not be exercised.

I. **PURPOSE:** The purpose of this Partnership Agreement (PA) between the SBA and the **HHS** is to delegate the SBA's contract execution functions to **HHS** per 13 CFR § 124.501(a). The following items are applicable to this PA:

- A. The PA sets forth the delegation of authority, delineates responsibilities, and establishes procedures for the award and oversight of 8(a) contract requirements.
- B. The PA encompasses all competitive and non-competitive acquisitions of **HHS** requirements awarded through the 8(a) BD Program.
- C. This PA applies to all SBA offices and all **HHS** Office of Small Disadvantaged Business Utilization (OSDBU) small business program offices and contracting offices deemed appropriate by the head of the agency, as defined in FAR 2.101 for **HHS**.
- D. This PA supplements the requirements set forth for the 8(a) BD Program under FAR 19.8 and 13 CFR § 124.
- E. This PA replaces any previously executed Memorandum of Understanding (MOU) or PA on the 8(a) BD Program between the SBA and **HHS**.

II. **ROLES AND RESPONSIBILITIES**

A. **SBA**

- 1. Delegates its 8(a) contract execution functions to the **HHS**, in accordance with 13 CFR § 124.501(a); delegates its authority under section 8(a)(1)(A) of the Act to

enter into 8(a) prime contracts, and its authority under section 8(a)(1)(B) of the Act to arrange for the performance of such procurement contracts by eligible 8(a) Program Participants. The **HHS** may re-delegate this authority to all warranted **HHS** Contracting Officers (CO);

2. Remains the prime contractor on all 8(a) contract awards, modifications, options and purchase orders and must receive copies of all contracts and subsequent modifications from the **HHS** in accordance with the processes delineated in this PA. The 8(a) Program Participant remains the SBA's subcontractor;
3. Will implement its responsibilities under this PA through uniform procedures for use by all SBA offices;
4. Will provide training for the **HHS** on the SBA 8(a) BD Program and various aspects of the PA;
5. Shall review the **HHS's** offering letters, and issue acceptance or rejection letters in accordance with the procedures set forth in Section III of this PA;
6. Shall review requests from the **HHS** to release requirements from the 8(a) BD Program, and approve or deny such requests in accordance with the procedures set forth in Section III of this PA;
7. Shall select an appropriate 8(a) Program Participant when the **HHS** submits an open offering letter for a sole source requirement;
8. Shall make eligibility determinations for 8(a) Program Participants;
9. Shall retain the responsibility for ensuring that 8(a) Program Participants comply with all applicable provisions relating to continued eligibility for 8(a) BD Program participation per 13 CFR § 124.112;
10. May identify a requirement for an 8(a) Program Participant for a possible award. The SBA may submit capability statements to the appropriate **HHS** contracting activities for the purpose of matching requirements consistent with the 8(a) Program Participant's capability;
11. Shall retain its appeal authority in accordance with FAR 19.810 and 13 CFR § 124.505; and
12. Shall retain the right to review all non-classified information in contract files so that the SBA can ensure compliance with the terms and conditions of this agreement.
13. The SBA's Procurement Center Representative (PCR) will not sign the **HHS's** small business coordination form until the following pending actions with the 8(a)

BD Program are officially coordinated and resolved with the SBA: requests to release a requirement from the 8(a) BD program; compliance with the notice requirements of 13 CFR § 125.504(d) when work that is or was performed under one or more 8(a) contracts will be procured outside the program through a requirement that has been deemed new; and the notice requirements of 13 CFR § 125.504(d) when the agency seeks to re-procure a follow-on to an 8(a) contract through a pre-existing limited 8(a) contracting vehicle and the incumbent 8(a) contract award was not so limited. See Section II.B.5 of this PA for the notification requirements.

14. Shall ensure SBA officials receive requisite education and training to deliver services described in this PA.

B. HHS

1. Shall adhere to all 8(a) BD Program requirements identified in FAR 19.8 and 13 CFR § Part 124;
2. Shall determine which requirements are suitable for offering to the 8(a) BD Program in accordance with FAR 19.8 and 13 CFR § Part 124, and, where appropriate, identify in conjunction with the appropriate SBA servicing District Office, 8(a) Program Participants capable of performing these requirements;
3. Shall submit offering letters to the SBA per FAR 19.8, 13 CFR § 124.502 and this PA;
4. Shall submit release requests to the SBA per FAR 19.8, 13 CFR § 124.504(d) and this PA;
5. Shall notify the SBA servicing District Office and the PCR assigned to the contracting office initiating a non-8(a) procurement in accordance with 13 CFR §124.504(d)(1) and this PA where a procurement intended for award outside the 8(a) BD program will contain work currently performed under one or more 8(a) contracts and **HHS** determines that the procurement should not be considered a follow-on requirement to the 8(a) contract(s), but rather procured through a requirement that it considers to be new; such notification must include the dollar value (exclusive of service extensions under FAR 52.217-8), primary and vital requirements, and end user of the previously performed 8(a) contract(s) as well as the dollar value, primary and vital requirements, and end user of the requirement that the **HHS** considers to be new;
6. Shall notify the SBA servicing District Office when the agency seeks to re-procure a follow-on to an 8(a) contract through a pre-existing limited 8(a) contracting vehicle and the incumbent 8(a) contract award was not so limited;

7. Shall coordinate as early as possible with the SBA servicing District Office when it seeks to offer a sole source 8(a) procurement on behalf of a joint venture. The **HHS** shall submit offer letters for proposed 8(a) joint ventures for sole source 8(a) contracts to the SBA's District Office that services the 8(a)-managing venturer of the joint venture for approval before contract award per FAR 19.8, 13 CFR § 124 and this PA;

8. Shall retain the responsibility for ensuring 8(a) BD Program Participants comply with all limitations on subcontracting requirements, including FAR Clause 52.219-14;

9. Shall receive and retain the SBA's delegation of contract execution and review functions by reporting all 8(a) contract awards, modifications, options and purchase orders to the SBA until such time as the agreement is amended or terminated. Provide a copy of all 8(a) contract awards, purchase orders, orders under BOAs and BPAs, option year modifications, or other contract modifications (i.e., modifications that add time, money or scope changes; novation, name changes) to the SBA servicing District Office within fifteen (15) days of execution;

10. Shall have the final authority over CPARS ratings for 8(a) contracts. The SBA may provide input or recommendations, but the final rating is determined by the **HHS**;

11. Shall inform the CO and other warranted officials and their equivalents who are awarding 8(a) contracts of their responsibilities concerning this agreement; and

12. Shall ensure that the CO and other warranted officials and their equivalents obtain training on their obligations under this PA and the subcontracting limitations of FAR 52.219-14 and 13 CFR §§ 124.510 and 125.6.

13. Shall ensure that any proposed sole source 8(a) contract action contains the appropriate FAR Subpart 6.3 justification for use of other than full and open competition.

14. Shall ensure that any proposed sole source award that exceeds applicable sole source thresholds contain a Justification and Approval (J&A) as set forth in FAR 19.808-1(a).

III. PROCEDURES: The policies and regulations detailed in the FAR, including FAR 19.8 and 13 CFR § Part 124 shall apply to 8(a) contracts, orders, modifications and options. Agencies are not authorized to issue internal guidance that would deviate from this agreement. The **HHS** and the SBA agree to the following:

A. 8(a) BD Program Offering and Acceptance

1. Offering letters: The **HHS** will follow the procedures at 13 CFR § 124.502 and FAR 19.804-2 for instructions to offer a procurement to the SBA for award through the 8(a) BD Program and to submit offer letters to the SBA

District Office. The SBA District Office will evaluate the offering letter package to determine if complete or request additional information if necessary. The **HHS** will allow the SBA five (5) working days to complete the review and respond with acceptance or decline.

Actions below the Simplified Acquisition Threshold (SAT) do not require offer and acceptance but do still require an eligibility determination for the 8(a) Program Participant (see Section III.A.3.b).

a. Sole source 8(a) Offers: Follow the procedures at FAR 19.808-1 and 13

CFR § 124.502(a). The **HHS** will coordinate with SBA on all offer letters for sole source 8(a) procurements to verify eligibility.

i. Open Requirements: If **HHS** has a requirement for which no specific 8(a) Program Participant is nominated, submit the offering letter to the SBA District Office that services the geographical area where the contracting activity is located. For competitive and open construction requirements, submit the offering letter to the SBA District Office servicing the geographical area where the work is to be performed. For construction requirements where place of performance is overseas submit the offer letter to the Division of Management and Technical Assistance at SBA's Headquarters at omta@sba.gov. Upon receipt of a complete offering letter package the respective SBA office will determine acceptance.

ii. Nominated 8(a) Participants: If **HHS** has a requirement for services or construction, and has nominated a specific 8(a) Program Participant, submit the offering letter to the SBA District Office responsible for servicing the nominated 8(a) firm.

iii. Sole source offering on behalf of 8(a) Program Participant for contracts above the competitive thresholds. Where the **HHS** determines that an 8(a) Program Participant is responsible to perform a specific requirement that exceeds the applicable competitive thresholds, but that there is not a reasonable expectation that at least two or more eligible 8(a) Program Participants will submit offers at a fair price, the **HHS** may submit a sole source offering letter on behalf of the identified 8(a) Program Participant. Only the AA/BD can approve such an offering. The **HHS** CO will work with the servicing the SBA District Office to coordinate the request and establish a review timeline. The **HHS** will use the appeal process described in Section III.C below to resolve concerns.

- b. **Joint venture nominees:** Where **HHS** offers a sole source 8(a) procurement on behalf of a joint venture, the SBA will conduct an eligibility review of the lead 8(a) party to the joint venture as part of its acceptance. The SBA must approve the joint venture prior to the award of the sole source contract. Submit the offering letter as soon as possible to the SBA District Office servicing the 8(a) managing venturer to ensure that it is approved prior to award. Upon receipt, the SBA may issue the acceptance or denial letter and eligibility determination, applicable no later than five (5) working days; and will coordinate a response date with the agency point of contact if more review time is needed. If no response is received within five (5) working days of request for acceptance, the **HHS** may assume acceptance on the sixth (6th) working day.
- c. **For Basic Ordering Agreements (BOA) and Blanket Purchase Agreements (BPA):** Refer to 13 CFR § 124.503(h). Neither BPA's or BOA's are contracts under the FAR (see 48 CFR § 13.303 and 48 CFR § 16.703(a)). Each 8(a) sole source or 8(a) competitive order to be issued under a BOA or BPA is an individual contract. The **HHS** must offer, and the SBA must accept, each sole-source order under a multiple-award BOA or BPA in addition to offering and accepting the BOA or BPA itself. An 8(a) Program Participant seeking to be awarded an order under a BOA or BPA must be a current, eligible Participant in connection with each order. The SBA will not accept for award on a sole source basis any task order under a BOA or BPA that would cause the total dollar amount of task orders issued to exceed the applicable competitive threshold.
- d. **Competitive:** Submit the offering letter for competitive 8(a) requirements to the SBA District Office that services the geographical area where the **HHS's** contracting activity is located. For competitive requirements to be performed overseas, submit the offering letters to the Division of Management and Technical Assistance at the SBA's Headquarters via email at omta@sba.gov.
- e. **Task or Delivery Order Contracts, including Multiple Award Contracts (MAC):**
- Multiple award contracts:** Refer to 13 CFR § 124.503(i). If the underlying task or delivery order contract or MAC was originally offered and accepted by the SBA for the 8(a) BD Program, and set-aside exclusively for 8(a) BD Program Participants, **HHS** is not required to submit offer letters for **competitive task orders**. For **sole source orders**, please follow the Offer and Acceptance procedures outlined in Section III.A.1.a.iii of this PA. The **HHS** must offer, and the SBA must accept, each sole source order under a multiple-award Task and

Delivery Order Contract, in addition to offering and accepting the Task and Delivery Order Contract itself.

Single award contracts: No offer and acceptance are required for competitive or sole source orders.

- f. **Establishing a new Multiple Award Contract (MAC) reserved for the 8(a) Program:** When establishing a new vehicle (defined as larger than 5 times the NAICS, multiple NAICS and/or a period of performance that is longer than five years) exclusively for 8(a) Program Participants **HHS** will work with their local SBA District Office to mutually establish a review timeline.

3. SBA Acceptance in accordance with 13 CFR § 124.503:

- a. **Actions that exceed the simplified acquisition threshold:** Follow the procedures at FAR 19.804-3 and 13 CFR § 124.503(a). Upon receipt of a complete offering letter package the SBA District Office will determine acceptance. The **HHS** and the SBA agree that SBA's decision whether to accept or reject the requirement will be transmitted to the **HHS's** CO in writing within five (5) working days of receipt of the offer. Absent a notification of rejection within five (5) working days of receipt of the offer, **HHS** may assume acceptance on the sixth (6th) working day unless an extension has been requested and accepted.
 - i. Reference FAR 19.804-3(a): **HHS** and the SBA District Office agree that if the CO sends an offering letter and subsequently changes strategy before the SBA acceptance has been provided, the **HHS's** CO may withdraw the offering letter from further consideration. Once the SBA receives the withdrawal, the SBA will stop the process of acceptance and the **HHS's** CO does not have to go through the release procedures to remove the requirement because it was never accepted into the 8(a) BD Program.
 - ii. **Withdrawal/substitution of offered requirement or Participant:** Refer to 13 CFR § 124.503(e). If the **HHS** determines the identified 8(a) Program Participant is not a good match for the procurement, including for such reasons as **HHS** finding the Participant non-responsible or the negotiations between the **HHS** and the Participant failing, the **HHS** may seek to substitute another 8(a) Program Participant. The **HHS** must inform the SBA District Office of its concerns regarding the originally identified Program Participant and identify whether it believes another Program Participant could fulfill its needs.
 - iii. If the SBA believes another Program Participant can fulfill the requirement, but the **HHS** disagrees, the SBA may appeal that

decision to the head of the procuring agency pursuant to 13 CFR § 124.505(a)(2).

- iv. If the SBA agrees that another Program Participant cannot adequately fulfill the requirement at a fair price, the **HHS** may withdraw the requirement from the 8(a) BD Program.

- b. **Actions below the simplified acquisition threshold:** Follow the procedures at FAR 19.804-3(a)(2) and 13 CFR § 124.503(a)(4). When the **HHS's** CO decides to use the 8(a) BD Program, the SBA authorizes award of an 8(a) contract without requiring an offer and acceptance of the requirement for the 8(a) BD Program. The CO shall contact the SBA servicing District Office to verify eligibility of the nominated 8(a) Program Participant. If no response is received within two (2) working days of an eligibility request, **HHS** may proceed with award on the third (3rd) working day. In such a case, the CO shall provide the following information to the SBA:
 1. Firm's Name, Address and DUNS;
 2. Total Dollar Amount;
 3. A copy of the executed contract.

Reference FAR 19.804-3(b)(2): In the event that the SBA does not believe the NAICS code assigned to the procurement is reasonable, the **HHS** and the SBA District Office agree to pursue the informal escalation process outlined in paragraph III.C.1 of this PA before pursuing the procedures in FAR 19.804-3(b)(2).

- c. **Federal Supply Schedules (FSS), including FAR Subpart 8.4 BPAs:** This section applies to all ordering activities governmentwide as defined at FAR 8.401.

The **HHS** must offer, and the SBA must accept, a Participant's base Schedule contract in order for the Participant to be deemed an eligible 8(a) contractor for any orders issued under the Schedule contract. This can be accomplished either by offering individual Schedule contracts to the SBA or by offering a pool under the Schedule for which only current 8(a) Program Participants are eligible. As with any other 8(a) contract, the SBA must determine eligibility prior to award of the contract. For those firms seeking to be deemed eligible 8(a) contractors under the FSS that currently have FSS contracts, the **HHS** must offer modifications to the existing base Schedule contract to the SBA or allow the firm to be awarded a new Schedule contract through a pool of eligible 8(a) Program Participants. SBA would perform an eligibility determination on the 8(a) firm prior to accepting the modification or contract.

The CO can issue 8(a) set-aside orders under FSS at their discretion. Subject to the following, the CO can issue orders from BPAs under FAR subpart 8.4 at their discretion.

Refer to Section III of this agreement for procedures for program offering, evaluation and acceptance.

- i. For a single-award FSS BPA under FAR Subpart 8.4, 8(a) acceptance is not required for orders, provided the single-award BPA was awarded competitively and was itself accepted into the 8(a) program for a term that does not extend past a date that is the firm's graduation date plus five years. Only active 8(a) Participants are eligible to receive a single-award BPA through the 8(a) BD Program. If accepted into the 8(a) BD Program at issuance, FSS BPAs are subject to the release procedures of 13 CFR 124.504.
- ii. For 8(a) sole source orders using multiple-award BPAs, the **HHS's** CO is required to submit an offering letter and obtain acceptance from the SBA. The 8(a) Participant must be eligible as of the date of award for the order. For 8(a) competitive orders off a FSS BPA, an 8(a) contractor is eligible only if the award is made not more than 5 years past the 8(a) contractor's graduation date.
- iii. The ordering agency must offer and receive SBA acceptance for 8(a) sole-source orders. Only active 8(a) Participants are eligible to receive sole-source orders. Graduated 8(a) Participants are not eligible to receive sole-source orders.
- iv. Where an 8(a) Participant was awarded a Schedule contract through a modification to a current Schedule contract, the 8(a) Participant may continue to receive new competitive orders under the Schedule contract for up to five (5) years from the date of award or recognition, even after the contractor's 8(a) Program term expires, the contractor otherwise exits the 8(a) Program, or the contractor becomes other than small for the NAICS code(s) assigned under the 8(a) contract. In addition, agencies may continue to take credit toward their prime contracting goals for orders awarded to 8(a) Program Participants.

Business concerns are not required to recertify size and/or socioeconomic status for set-aside orders (see FAR 19.301-2). However, if an 8(a) contractor re-represents that it is other than small for the NAICS code(s) assigned under the contract or, where ownership or control of the 8(a) contractor has changed and the SBA has granted a waiver to allow the contractor to continue performance (see 13 CFR § 124.515), the **HHS** may not credit any subsequent orders awarded to the contractor towards its small,

disadvantaged business or small business goals. This is also dependent on whether ownership has changed to another 8(a) firm, or to another socially and economically disadvantaged individual, or, for the small business goal, where the firm is still small.

- v. A limited source justification as noted at FAR 8.405-6 is not required for orders or BPAs that are sole source 8(a) awards under FSS.

B. Competition below the competitive thresholds

1. **General:** Reference FAR 19.805-1(a)(2): **HHS** and SBA acknowledge that, under the Federal Supply Schedule (FSS), STARS vehicles, or any governmentwide acquisition contract (GWAC), orders set aside for 8(a) Program Participants may be awarded on the basis of competition limited to all eligible 8(a) Program Participants at any dollar value. The CO shall work with the SBA District Office to coordinate the 8(a) Program Offer and Acceptance. Refer to Section III.A. above.
2. **Procedures:** Follow the procedures at FAR 19.805-2(b): If **HHS** requests an eligibility determination the SBA has five (5) working days after receipt of the CO's request to respond. If **HHS** has not received a response within five (5) working days of request **HHS** may assume eligibility on the sixth (6th) working day.

C. SBA Appeals: Reference FAR 19.810: **HHS** and the SBA agree to pursue the informal escalation process steps outlined below in the event that a disagreement arises between the **HHS's** CO and the SBA representative (District Office, Business Opportunity Specialist (BOS), Procurement Center Representative (PCR), or any SBA representative):

1. The **HHS's** CO shall seek assistance from their agency Small Business Technical Advisor (SBTA), or agency Small Business Specialist if an SBTA is not assigned, to coordinate a meeting with the SBA Representative to attempt to resolve the issue at the lowest level possible, within ten (10) working days. The SBA representative may include, but is not limited to, the District Director or their Deputy.
2. If step 1 is not successful, the **HHS** shall seek assistance and coordinate a meeting with the SBA District Director and the SBA Area Director to resolve within five (5) working days.
3. If there is no resolution from steps 1 or 2, the **HHS** shall contact their agency's Office of Small and Disadvantaged Business Utilization (OSDBU) to coordinate a meeting with the SBA Associate Administrator, Office of Business Development (AA/BD) to resolve within five (5) working days. The

POC for these requests is the SBA's Director, Management and Technical Assistance Division and the **HHS** will email the request to the SBA at omta@sba.gov.

4. The last step in the informal escalation process before following the procedures of FAR 19.810 would be a discussion between the **HHS** OSDBU, the SBA Associate Administrator, Office of Business Development (AA/BD) and the Deputy Associate Administrator, Office of Government Contracting and Business Development (DAA/GCBD) to resolve the issue.
5. When the SBA is notified by an 8(a) Program Participant with concerns about **HHS** procurement causing adverse impact, the SBA will promptly notify the **HHS's** OSDBU and senior procurement official representative in writing. The **HHS** representative will respond in 10 (ten) working days.

D. Administration of Contracts: The **HHS's** CO must advise and consult with the SBA of any intent to terminate an 8(a) contract for default or convenience before doing so (refer to 13 CFR § 124.518). The CO will contact the SBA District Office servicing the incumbent 8(a) firm awarded the original underlying contract.

F. Release for Non-8(a) or Limited 8(a) Competition: Reference FAR 19.815 and 13 CFR § 124.504(d) for release from the 8(a) BD Program. Where a procurement is offered and accepted into the 8(a) BD Program and subsequently awarded as an 8(a) contract, its follow-on requirement must remain in the 8(a) BD Program unless the SBA Associate Administrator for Business Development (AA/BD) agrees to release it.

1. **General:** The **HHS** CO must notify the SBA of any follow-on procurement from the 8(a) BD Program when going to a multiple award contract (MAC) that is not itself an 8(a) contract, but where the procuring activity intends to compete and award a competitive 8(a) order under the MAC.

Release from the 8(a) BD Program is not required for follow-on procurements that are offered to and accepted into the program. Task or delivery orders, including BPAs using FAR 8.405-3, under a basic contract or established pools accepted into the 8(a) BD program are covered and do not require release.

2. **Procedures:** When a release is requested, **HHS** and the SBA agree to send the release request to the SBA District Office where the original offering letter or other notice was accepted. **HHS** will provide the following additional information in the request for release:
 - a. Reason(s) for the request;
 - b. Procurement history of the requirement;
 - c. Market research;
 - d. Re-procurement strategy;

- e. Incumbent 8(a) contractor name;
 - f. Assigned NAICS Code; and,
 - g. Statement of Work; and
 - h. Copy of the SBA's original acceptance letter from the procurement history; and
 - i. Agency goals and achievements for SDB, SDVOSB, HUBZone and WOSB.
3. Reference FAR 19.815(c): The **HHS** will coordinate its request for release with the SBA servicing District Office. Upon receipt of the request the SBA will work with the requestor to mutually establish a review timeline. The **HHS** will use the appeal process described in Section C above to resolve concerns.
4. **New Requirements:** In accordance with 13 CFR § 124.3 and the definition of follow-on requirement or contract, the **HHS** and the SBA agree that the expansion or modification of an existing requirement may be considered a new requirement for:
- a. significant scope changes requiring different capabilities of work,
 - b. 25% value change for equivalent periods of performance (adjusted for inflation), and/or
 - c. requirement end user changes.

Meeting any one of these conditions is not dispositive that a requirement is new. In particular, the 25% and end user rules cannot be applied rigidly in all cases (e.g., consolidated requirements and assisted acquisitions).

- ii. For **New requirement determinations:** The **HHS** CO shall notify the SBA servicing District Office and the PCR, as early as possible in the acquisition but no later than 30 days prior to the submission of the acquisition review package to the PCR that it intends to procure work currently under one or more 8(a) contracts as a requirement it considers to be new. Such notification must include:
 - a. The basis for **HHS's** determination that the requirement is new relative to the work currently fulfilled under the 8(a) BD Program;
 - b. The Independent Government Cost Estimate for the requirement and applicable market research based on estimated dollar value;
 - c. The statements of work for the new requirement and the work currently fulfilled under the 8(a) BD Program; and
 - d. Procurement history.

IV. TERM / AMENDMENT

- A. This PA is effective on the date of SBA's signature. This PA may be amended, in writing, at any time by mutual agreement of the parties.
- B. Either the SBA or **HHS** may terminate this PA upon thirty (30) calendar days advance written notice to the other party.
- C. Either the SBA or **HHS** may suspend this PA for failure to follow the terms of this PA upon thirty (30) calendar days advance written notice to the other party.
- D. This PA does not have an expiration date. However, it will be reviewed at a minimum every five (5) years from its effective date for accuracy and effectiveness and modified as needed.

Termination or suspension of this PA will require **HHS** to utilize the prescribed processes to contract with the SBA for the 8(a) BD Program as stated in FAR 19.8.

V. ADMINISTRATION

For HHS:

Shannon C. Jackson
Executive Director
U.S. Department of Health and Human Services
shannon.jackson@hhs.gov

For SBA:

Associate Administrator, Office of Business Development
Government Contracting and Business Development
Office of Program Review (OPR/GCBD)
Sharon.Gurley@sba.gov

VI. ACCEPTANCE : Authorized by, and on behalf of their respective agencies, the undersigned parties hereby accept the terms and conditions of this agreement.

For HHS:

Shannon C. Jackson -S Digitally signed by Shannon C. Jackson -S
Date: 2023.01.22 10:46:58 -05'00'

Shannon C. Jackson
Executive Director

Date

U.S. Department of Health and Human Services
shannon.jackson@hhs.gov

Henrietta K.
Brisbon -S

Digitally signed by Henrietta K.
Brisbon -S
Date: 2023.03.12 15:27:54 -04'00'

Katrina Brisbon
Senior Procurement Executive
U.S. Department of Health and Human Services
Katrina.brisbon@hhs.gov

For SBA:

Donna L. Peebles

March 20, 2023

Donna L. Peebles, D.M
Associate Administrator, Office of Business Development (AA/BD)
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U.S. Small Business Administration
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