



August 25, 2023

CAAC Letter 2023-04

MEMORANDUM FOR CIVILIAN AGENCIES

FROM: WILLIAM CLARK
DIRECTOR
OFFICE OF GOVERNMENT-WIDE ACQUISITION POLICY

SUBJECT: 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) Program"

This CAAC Letter is being issued in my capacity as Chair of the Civilian Agency Acquisition Council to serve as consultation in accordance with FAR 1.404, authorizing 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 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.

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.

When the contract action 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 list), 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 the attachment to this letter.

Agencies should consult with their legal counsel when developing their agency deviation and acquisition workforce guidance. Agencies should also review their 8(a) Partnership agreements (if applicable), and review any supplemental agency guidance on 8(a) requirements, to update or clarify procedures as necessary to comply with the SBA Memorandum.

Agencies are encouraged to review the "Continued Use of the 8(a) Program During the Ultima Injunction - Frequently Asked Questions" issued and maintained by SBA when developing and issuing guidance to the agency's acquisition workforce. Additional questions agencies may have regarding the SBA Memorandum may be sent to SBA at 8aquestions@sba.gov per the instructions in the FAQ document.

This CAAC letter constitutes consultation with the Chair of the CAAC required by FAR 1.404(a)(1). Agencies are reminded that FAR 1.404 requires agencies to furnish a copy of each approved class deviation to the FAR Secretariat, General Services Administration, by emailing the deviation to GSARegSec@gsa.gov. Please include whether or not the document can be posted on acquisition.gov.

If you have any questions or require additional information about this Letter, please contact Carrie Moore at (571) 300-5917 or at carrie.moore@gsa.gov.

ATTACHMENT - 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 ~~struckthrough 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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