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## 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](mailto:8aquestions@sba.gov). Please use "Memo on Recent Court Decision Question" as the subject to assist with routing.