



U.S. Department of Justice

Justice Management Division

Senior Procurement Executive

Washington, D.C. 20530

MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS

FROM: Morton J. Posner
Acting Senior Procurement Executive
Acting Deputy Assistant Attorney General
for Policy, Management, and Procurement

SUBJECT: Federal Acquisition Regulation 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”*

1. PURPOSE

This class deviation is issued under the authority of Federal Acquisition Regulation (FAR) 1.404 authorizing agencies to implement the U.S. Small Business Administration’s (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 on August 18, 2023. This SBA memorandum provides guidance on utilizing the 8(a) Program while an injunction related to SBA’s use of the “rebuttable presumption” to certify contractors in the 8(a) Program is in effect.

To comply with the injunction, the Civilian Agency Acquisition Council (CAAC) authorized a FAR deviation from FAR 19.804-3(a)(1) and (a)(2).

2. BACKGROUND

This FAR class deviation is in response to a court injunction issued by the United States District Court for the Eastern District of Tennessee on July 19, 2023, enjoining the SBA “from using the rebuttable presumption of social disadvantage in administering” the 8(a) Business Development Program (8(a) Program).¹ 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.

SBA issued interim guidance to the 8(a) Program considering the court ruling affecting the program’s determination of social disadvantage. Compliance with SBA’s guidance requires agencies to deviate from certain FAR requirements for the 8(a) Program.

On August 25, 2023, the CAAC issued Letter 2023-04 authorizing agencies use of a FAR deviation to ensure compliance with the injunction on the 8(a) Program and SBA’s guidance.

¹ *Ultima Servs. Corp. v. Dep’t of Ag., No. 20-cv-0041* (E.D. Tenn.)

3. AUTHORITY

This class deviation is issued under the authority of FAR 1.404.

4. DEVIATION

See Attachment 1 – Deviation to FAR Text, Part 19 - Small Business Programs

5. EFFECTIVE DATE AND EXPIRATION

This deviation is effective immediately and remains in effect until the FAR is amended or the deviation is otherwise rescinded.

6. SCOPE AND APPLICABILITY

This class deviation applies to all Department of Justice (DOJ) contracting activities.

This deviation applies in lieu of the DOJ and SBA Partnership Agreement procedures related to assumed acceptance of the offeror's eligibility by SBA. DOJ Contracting Officers (COs) must receive SBA's decision of acceptance prior to proceeding with award in accordance with the attached deviations from FAR 19.804-3(a)(1) and (a)(2).

Specifically, SBA acceptance of the offeror demonstrating an affirmative finding of social disadvantage will be required for:

1. Unpriced options on 8(a) contracts;
2. 8(a) set-aside orders under a non-8(a) Governmentwide Acquisition Contract (GWAC)/Indefinite Delivery Indefinite Quantity (IDIQ) contract or Multi-Agency Contract (MAC);
3. 8(a) directed or sole-source orders under an 8(a) GWAC/IDIQ (e.g., STARS III) or Blanket Purchase Agreements under the Federal Supply Schedule (FSS);
4. New sole-source awards using 8(a) authority; and
5. 8(a) contract novations.

For new competitive 8(a) awards (not against an existing 8(a) GWAC/IDIQ/MAC), the procuring agency will need to request an eligibility determination of the identified apparent successful offeror or offerors. SBA will verify that the nominee(s) meet(s) the social disadvantage requirement in connection with the contract eligibility determination.

There is no impact to contracts awarded prior to July 19, 2023, including in-scope modifications and priced options, as the award was made under the rules in effect at that time. COs may continue to make competitively awarded task orders.

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.

An Acquisition Policy Notice will be issued by the Department's Office of Acquisition Management with this FAR Deviation to provide operational/implementation guidance to the DOJ acquisition workforce.

7. ADDITIONAL INFORMATION

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*," August 18, 2023, and SBA's document "Continued Use of the 8(a) Program During the Ultima Injunction Frequently Asked Questions" provides additional guidance in response to the court injunction. These documents are located on OMB MAX.gov website.

If you have questions, please contact DOJAcquisitionPolicy@usdoj.gov.

8. ATTACHMENTS

Attachment 1 – Deviation to FAR Text, Part 19 - Small Business Programs

**CLASS DEVIATION
FINDINGS AND DETERMINATION
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”**

Findings

1. 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*” (“SBA memorandum”) was issued by SBA on August 18, 2023, in response to a court decision in the case *Ultima Servs. Corp. v. Dep’t of Ag. (E.D. Tenn.)*. The court issued an injunction against SBA’s use of the rebuttable presumption which assumed, unless there was 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. Due to the injunction, SBA must make an affirmative determination that the individual upon whom eligibility for the 8(a) Program is based has established personal social disadvantage without the presumption before awarding an 8(a) contract. As a result, SBA must review whether existing 8(a) contractors utilized the rebuttable presumption when accepted into the program prior to allowing for any new awards to be issued to the contractor. SBA must make an affirmative determination when an offering letter is received and therefore agencies may not assume acceptance by SBA as is currently allowable following certain timeframes under FAR 19.804-3(a)(1) and (a)(2).
2. As a result of these changes, the Civilian Agency Acquisition Council issued a Letter on August 25, 2023, authorizing agencies to issue class deviations implementing these provisions while the court injunction is in effect.

Determination

It is hereby determined that a class deviation is appropriate to implement the court’s injunction. This class deviation will be effective as stated and will remain in effect until the FAR is amended or the deviation is otherwise rescinded.

Jolene Ann Lauria
Acting Assistant Attorney General
for Administration

Date

ATTACHMENT 1

Deviation to FAR Text, Part 19 - Small Business Programs

Baseline is accurate through FAC 2023-05, to be effective September 22, 2023.
Changes to baseline shown as **[bolded, bracketed additions]** and ~~struck through 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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