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GSA Office of Government-wide Policy

Acquisition Alert AA-2023-05

## MEMORANDUM FOR THE GSA ACQUISITION WORKFORCE

FROM

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SUBJECT:

Update on Contracting with 8(a) Businesses

**1. What is the purpose of this Acquisition Alert?**

The purpose of this Acquisition Alert (AA) is to answer questions from the GSA acquisition workforce on the impact of a recent court decision in *Ultima Services Corporation vs. USDA et al.* In this decision, the District Court for the Eastern District of Tennessee ruled against the Small Business Administration's (SBA's) use of a "rebuttable presumption of social disadvantage" in the 8(a) program.

Through its regulations, SBA admitted applicants to the 8(a) program using a "rebuttable presumption" that certain groups (e.g. Black, Hispanic, Asian-Pacific, and Native American) are socially disadvantaged. Other individuals (e.g. persons with disabilities) could submit a narrative demonstrating social disadvantage which SBA would review to determine if they were also socially disadvantaged.

In a United States Department of Agriculture (USDA) acquisition, a non-8(a) small business sued USDA and SBA arguing that SBA's "rebuttable presumption" violated constitutional rights to equal protection. The court enjoined SBA from using the "rebuttable presumption" in administering the 8(a) program.

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.

## 2. What is the impact on GSA's contracting officers?

As a result of the decision, SBA announced:

- a. There is generally 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. You may continue to make competitively awarded task orders.
- b. An affirmative finding of social disadvantage will be required for-
  - i. Unpriced options on 8(a) contracts,
  - ii. 8(a) set-aside orders under a non-8(a) Governmentwide Acquisition Contract (GWAC)/Indefinite Delivery Indefinite Quantity (IDIQ) contract; Multi-Agency Contract (MAC),
  - iii. 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),
  - iv. New sole-source awards using 8(a) authority, and
  - v. 8(a) contract novations.
- c. For new competitive 8(a) awards (**not against an existing 8(a) MAC/GWAC/IDIQ**), the procuring agency will 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.

As a general rule, the following guidelines apply:

- a. For new contracts awarded after July 19, 2023, utilizing 8(a) authority, all new awards will require an affirmative determination of social disadvantage by the SBA for the apparent successful offeror, including-
  - i. Directed or sole-source awards to an 8(a) participant, or
  - ii. Set-aside awards, partially or in whole, to 8(a) participants.
- b. For existing contracts awarded prior to July 19, 2023, utilizing 8(a) authority, an affirmative determination of social disadvantage by the SBA is necessary when-
  - i. Exercising an unpriced option, or
  - ii. Issuing a modification in response to a novation request.
- c. An affirmative determination of social disadvantage by the SBA is **not** required for contracts awarded using 8(a) authority prior to July 19, 2023 when-
  - i. Exercising a priced option, or
  - ii. Issuing an in-scope modification.

- d. For new orders against existing vehicles, the treatment is discussed below under the “Question and Answer” section of paragraph 3.

**3. Questions and Answers specific to the operation of GSA contracts for the GSA Acquisition Workforce.**

**a. Question 1: What is the status of the GSA/SBA Partnership Agreement?**

- i. **Answer 1:** While the Partnership Agreement remains in effect, during the period that GSA Class Deviation 2023-08 is in effect, the Partnership Agreement cannot be used for “deemed” acceptance of a contractor’s status as an 8(a) Participant, and instead, a contracting officer must request and receive from the SBA an affirmative determination of eligibility (i.e., socially disadvantaged status) prior to award at any time offer and acceptance would be required. All other terms of the Partnership Agreement remain in effect and are fully valid.

**b. Question 2: When is a CO generally required to receive an affirmative determination by SBA of a vendor’s socially disadvantaged status?**

- i. **Answer 2:** Generally, an affirmative finding of social disadvantage will be required for-
  - A. Unpriced options on 8(a) contracts,
  - B. 8(a) set-aside orders under a non-8(a) GWAC/IDIQ,
  - C. 8(a) directed or sole-source orders under an 8(a) GWAC/IDIQ (e.g., 8(a) STARS III, OASIS 8(a) etc. the 8(a) pool under the Federal Supply Schedule)
  - D. New contract awards using 8(a) authority, and
  - E. 8(a) contract novations.

**c. Question 3: What do I do with an existing order to a contractor that is an 8(a) participant but the award was not made using the 8(a) authority (i.e., a “non 8(a) contract” but awarded to an 8(a) participant)?**

- i. **Answer 3:** As contracts of this type were not awarded using the 8(a) authority, no changes are needed.

**d. Question 4: What do I do with an existing order against an existing contract that was awarded using the 8(a) authority (i.e., “an 8(a) contract”)?**

- i. **Answer 4:**

- A. You may continue to exercise priced options against the order and make in-scope modifications to the order. Continue to administer the order as normal.
  - B. Exception: If the order includes an unpriced option, you cannot exercise that option until you have SBA confirmation that the firm has been determined to meet the social disadvantage requirement.
    - 1. Note: If there is a novation request for the contract under which the existing order was placed, the contracting officer cannot award a novation modification for the 8(a) contract unless the SBA has confirmed that the receiving firm meets the social disadvantage requirement.
- e. **Question 5: What do I do with an IDIQ contract awarded through full and open competition which includes companies that are in the 8(a) Program?**
- i. **Answer 5:** As contracts of this type were not awarded using 8(a) authority, no changes are needed.
- f. **Question 6: What do I do with an existing FAR Part 8 Blanket Purchase Agreement (BPA) under the Federal Supply Schedule which was awarded using 8(a) authority?**
- i. **Answer 6:** Competitively awarded orders under previously competitively awarded vehicles, including calls or orders under BPAs, are permitted.
- g. **Question 7: What do I do with an existing GSA-specific IDIQ vehicle awarded using 8(a) authority (e.g., a PBS “8(a) IDIQ” vehicle) for construction?**
- i. **Answer 7:**
    - A. As competitive task orders under previously competitively awarded vehicles are permitted, you may continue to place competitive orders.
    - B. However, sole-source orders must have an SBA affirmative determination of social disadvantage prior to award.

**h. Question 8: What happens with existing government-wide 8(a) contracts, such as the Federal Supply Schedule 8(a) Pool, 8(a) STARS III, and OASIS 8(a)?**

**i. Answer 8:**

**A. Managing the contract vehicle:**

1. Continue normal contract administration of the master level contract. For example, process modifications and monitor performance.
2. Before awarding a new FSS contract for the 8(a) pool, await SBA verification that the entity is eligible.
3. Anticipate questions from customers and from your contractors. Refer to the alternatives section, in question 9 below.

**B. Placing new orders under the government-wide contract vehicle:**

1. Before you may make a new sole source award, SBA will need to complete their offer and acceptance process (this process will include the SBA taking the extra step of validating the eligibility of the potential awardee).
2. You can proceed with new competitive orders as usual.

**i. Question 9: Can you explain some alternatives for mission critical work that needs to be accomplished?**

**i. Answer 9: Yes, please consider the alternatives below in the following order:**

- A.** For sole source orders or contracts using 8(a) authority, if time permits, proceed with the planned acquisition strategy and obtain confirmation from SBA the firm is eligible. You cannot place a sole source order or contract until you receive SBA confirmation.
- B.** Under GSA's partnership agreement with SBA, you can compete orders below the competition threshold without further approval when using GSA's government-wide contract vehicles. Rather than sole source, consider using competitive procedures for requirements which can be fulfilled through 8(a) STARS III, OASIS 8(a), the 8(a) pool on MAS and other GSA 8(a) government-wide contract vehicles.
- C.** You may have planned on using the 8(a) program, either sole-source or competitive, to meet a new requirement for which

there is an unusual and compelling urgency. For such a requirement, you may follow the procedures in FAR 6.302-2 or 8.405-6, as applicable, to place a new order under an existing IDIQ, or to award a new contract to an 8(a) firm (this will not however be an award using 8(a) authority, just an award to an 8(a) participant, therefore 8(a) procedures are not applicable).

- D. In some circumstances, over the remainder of Fiscal Year 2023 and potentially through the end of calendar year 2023, you could have a requirement previously awarded using 8(a) authority but no contractors SBA has determined are eligible 8(a) participants for the requirement. Normally, in this situation you would request a release in accordance with FAR 19.815. Where time permits, request such a release. However, as a last resort, if you have an unusual and compelling circumstance and there's no reasonable expectation that SBA can make the determination in a timely manner sufficient to satisfy the requirement, then and only then, through December 31, 2023, upon completion of a written determination and finding that unusual and compelling circumstances which significantly affect interests of the United States will not permit waiting<sup>1</sup>, you may award a short-term bridge contract as a new requirement, as defined in the SBA-GSA Partnership Agreement. Follow the new requirement determination and notification procedures on pages 12 and 13 (section (III)(F)(4)) of the Partnership Agreement. While the requirement remains in the 8(a) program for future follow-ons, for the one time buy, you may proceed. You may follow the procedures in FAR 6.302-2 or 8.405-6, as applicable, to justify an award to an 8(a) firm (this will not however be an award using 8(a) authority, just an award to an 8(a) participant).<sup>2</sup>

#### 4. Where Can I Get More Information?

Questions about this AA can be sent to the GSA Acquisition Policy Division, at [GSARPolicy@gsa.gov](mailto:GSARPolicy@gsa.gov)

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<sup>1</sup> 15 U.S.C. 637(a).

<sup>2</sup> See *eAlliant, LLC*, B- 407332.4, B- 407332.7 (Dec. 23, 2014).