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# Acquisition & Assistance Policy Directive (AAPD)

From the Director, Office of Acquisition & Assistance

## AAPD No. 23-02

### Verification of Eligibility for the 8(a) Program

Issued: September 5, 2023

AAPDs provide information of significance to all Agency personnel and partners involved in the Acquisition and Assistance process. Information includes (but is not limited to): advance notification of changes in acquisition or assistance regulations; reminders; procedures; and general information. AAPDs may be used to implement new requirements on short notice, pending formal amendment of acquisition or assistance regulations. Each AAPD is effective as of the issuance date on its cover page unless otherwise noted elsewhere in the AAPD guidance; the directives remain in effect until the specified expiration date (if any) or M/OAA/Policy issues a rescission.

This AAPD is:  New  Replaces: \_\_\_\_\_

Category:  Acquisition  Assistance  PSCs

This AAPD applies to:  Solicitations  New awards  Existing awards  
 Modification required

This AAPD precedes changes to:

FAR 19.804-3  AIDAR \_\_\_\_\_  CFR \_\_\_\_\_  
 ADS \_\_\_\_\_  Other \_\_\_\_\_  No change to regulations

Clause/Provision:  New Provision/Clause Provided Herein  Available in GLAAS

Contains a deviation?  No  Yes: # M-OAA-DEV-FAR-23-03c effective until: 09/04/2025

/s/

\_\_\_\_\_  
Deborah Broderick, Acting Director, M/OAA

## I. Purpose

The purpose of this AAPD is to inform the USAID acquisition workforce of updates to the process for issuing awards under the 8(a) Business Development Program ([8\(a\) Program](#)). These updates are necessary due to a recent U.S. District Court injunction<sup>1</sup>, as well as related guidance issued by the Small Business Administration (SBA), in consultation with the Department of Justice (DOJ).

Prior to making an award under the 8(a) Program, the Contracting Officer (CO) must take the steps outlined in the “Required Actions” below to verify the business’ eligibility as socially disadvantaged. This verification is in lieu of using the System for Award Management for determining 8(a) eligibility or presuming acceptance of a requirement by the SBA.

Use of the deviated FAR text found in this AAPD is authorized through the approval of class deviation #M-OAA-DEV-FAR-23-03c and Civilian Agency Acquisition Council (CAAC) Letter No. 2023-04.

The actions required in this AAPD are anticipated to be temporary in nature, as SBA reassesses the overall 8(a) Program and certification requirements in light of the injunction. This AAPD is effective as of the issuance date on the cover page and continues in effect until September 4, 2025, but may be rescinded earlier.

## II. Required Actions

The “Additional Guidance” section below contains additional “Applicability” information regarding the specific types of 8(a) concerns subject to this AAPD.

For awards to applicable 8(a) concerns issued between July 19, 2023 and the effective date of this AAPD, COs must contact M/OAA/Policy through the ["Ask M/OAA/Policy"](#) Google Group for further guidance.

For awards to applicable 8(a) concerns to be issued after the effective date of this AAPD:

- (1) The CO must first verify whether the 8(a) concern is eligible on SBA’s “8(a) Social Disadvantage Qualification List” on MAX.gov.**

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

SBA maintains a list of 8(a) participants that it has determined are eligible for award because: (i) SBA has made an affirmative determination that the individual-owned small business participant is socially disadvantaged, (ii) the small business participant did not use the rebuttable presumption of social disadvantage and does not require affirmation, or (iii) an affirmation is not required for “entity-owned small businesses.”

COs may access this “8(a) Social Disadvantage Qualification List” on the SBA Office of Policy, Planning and Liaison (OPPL) Collaboration page on OMB’s [MAX.gov](#) platform by clicking the check box next to the file name and then the “View” button. An HTML file will download to the user’s computer. After opening this HTML file, a searchable list appears containing the names and unique entity identifiers (UEIs) of 8(a) participants that SBA has determined are eligible for award. Below is a screenshot of the list on the MAX.gov site:



The CO must review this “8(a) Social Disadvantage Qualification List” to determine if the business is listed there before proceeding with an 8(a) award.

**Note:** If a CO cannot access the “8(a) Social Disadvantage Qualification List” on OMB’s [MAX.gov](#) site, the CO may contact [OSDBU](#) with the UEI and name of the 8(a) concern to request that OSDBU check the list on the CO’s behalf.

SBA sends qualification letters to every current 8(a) Program participant that is eligible for award as those businesses are added to this “8(a) Social Disadvantage Qualification List.” COs may request a copy of this qualification letter from the 8(a) concern in addition to consulting the “8(a) Social Disadvantage Qualification List” on MAX.gov.

- (2) If the business is listed on the “8(a) Social Disadvantage Qualification List,” the CO may proceed with the standard offering and acceptance procedures outlined in [FAR 19.804-2](#) and [FAR 19.804-3](#). No further action under this AAPD is required.
- (3) If the business is not listed on the “8(a) Social Disadvantage Qualification List,” the CO must obtain the SBA’s affirmative response of acceptance of the requirement into the 8(a) Program. As such, the CO must proceed with the offering and acceptance procedures outlined in [FAR 19.804-2](#) and the **deviated FAR 19.804-3** text as shown in **Attachment 1** of this AAPD. If the SBA provides an affirmative response of acceptance, then no further action under this AAPD is required.
- (4) If the business is not listed on the “8(a) Social Disadvantage Qualification List,” and the CO does not obtain the SBA’s affirmative response of acceptance of the requirement into the 8(a) Program, the 8(a) concern is not eligible for award.<sup>2</sup> USAID may award the requirement to a different 8(a) participant that has established social disadvantage through steps 1-3 (or did not use the rebuttable presumption of social disadvantage) or award the contract through an alternative means. The CO may contact [OSDBU](#) for assistance in identifying alternative 8(a) participants.

### III. Additional Guidance

**SBA Partnership Agreement:** The requirements of this AAPD supersede the guidance found in [ADS 302.3.4.8](#) regarding expediting awards to 8(a) concerns and related procedures in USAID’s 8(a) Program Partnership Agreement with SBA. The Partnership Agreement remains in effect; however, during the period that this AAPD is in effect, the Partnership Agreement cannot be used for “deemed” acceptance of a contractor’s status as an 8(a) participant. All other terms of the Partnership Agreement remain in effect and are fully valid.

**Applicability:** There are three categories of 8(a) Program participants:

- *Group 1* – Individual-owned small businesses that used the rebuttable presumption of social disadvantage to establish eligibility.
- *Group 2* – Individual-owned small businesses that did not use the rebuttable presumption of social disadvantage and therefore have already provided SBA with documentation to establish social disadvantage.

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<sup>2</sup> If the 8(a) concern cannot establish social disadvantage as part of this new process, SBA will not be able to consider the business owner’s eligibility for this specific proposed award due to operational constraints. Therefore, SBA will not issue an affirmative response of acceptance, instead communicating to the CO through the deviated FAR 19.804-3 process that the 8(a) concern is not eligible for award.

- *Group 3* – Entity-owned small businesses that 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 by the injunction and, therefore, not subject to this AAPD. **The injunction and this AAPD only apply to Group 1 above.**

#### **Awards not impacted by the court injunction and this AAPD:**

- **Existing contracts and orders:** The injunction and this AAPD do not apply to contracts and orders that were placed into the 8(a) Program and executed prior to July 19, 2023.
- **In-scope modifications and options:** The injunction and this AAPD do not apply in-scope modifications and exercise priced options to existing contracts/orders, unless verification of eligibility would otherwise be required (see [FAR 19.812\(d\)](#)).
- **Competitive 8(a) awards:** The injunction and this AAPD do not apply to competitive 8(a) orders under existing 8(a) multiple-award contracts, Governmentwide acquisition contracts (GWACS), and Federal Supply Schedule (FSS) contracts. Under these types of contracts, eligibility flows down from the multiple award IDIQ contract; agencies do not offer and SBA does not accept individual orders into the 8(a) program. SBA does not make a new eligibility determination with respect to such orders. Agencies may compete orders amongst 8(a) contractors, at any dollar level, when using the 8(a) Multiple Award Schedule (MAS) Pool on the GSA FSS and when using GSA's government-wide IDIQs for 8(a) firms, including GSA's 8(a) STARS III GWAC, without affirmation of eligibility from SBA prior to award.
- **Other types of prime contracts:** 8(a) participants remain eligible for other types of prime contracts and orders, including unrestricted, small business set-aside,

and other socio-economic procurements. The injunction and this AAPD only apply to awards issued under the 8(a) Program.

**Encouraging 8(a) concerns to work with SBA:** COs are encouraged to recommend to potential 8(a) awardees that those businesses work with SBA as soon as possible to address their social disadvantage eligibility. The SBA's [8\(a\) Program website](#) has guidance and resources for 8(a) program participants in light of the U.S. District Court injunction, including instructions for how 8(a) concern owners can establish their individual social disadvantage by completing a social disadvantage narrative for SBA review.

**Additional support from SBA:** In addition to the [8\(a\) Program website](#) resources, SBA issued a "[Continued Use of the 8\(a\) Program During the Ultima Injunction - Frequently Asked Questions](#)" document that provides responses to certain questions. The SBA [MAX.gov](#) page also has an "8(a) Active List" that details all 8(a) participants. If a CO and/or a specific 8(a) concern need support from SBA regarding the 8(a) concern's eligibility status, this list includes the applicable SBA district office name to contact for assistance.

#### **IV. Background**

Prior to July 2023, in administering the 8(a) Program, the SBA applied a "rebuttable presumption" of social disadvantage to individuals of certain minority groups in processing applications to the 8(a) Program, including Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Asian Americans, and members of other groups designated by SBA. This rebuttable presumption is established by SBA regulations (see [13 CFR 124.103](#)), not by statute. 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

In applying for the 8(a) Program, those individuals who are not members of the groups designated in SBA regulations as possessing the rebuttable presumption of social disadvantage must affirmatively establish that they are socially disadvantaged based upon at least one objective distinguishing feature that has contributed to social disadvantage that is rooted in treatment the individual experienced in American society, is chronic and substantial, and negatively impacted on the individual's entry into or advancement in the business world.

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) Program.<sup>3</sup> As a result of this injunction, members of groups that were identified by SBA as having a rebuttable presumption of social disadvantage will now need to affirmatively establish the existence of social disadvantage.

SBA, in consultation with DOJ, prepared the [SBA Memorandum dated August 18, 2023](#) (“Impact of Recent Court Decision (*Ultima Servs. Corp. v. Dep’t of Ag.* (E.D. Tenn.)) on the Use of the 8(a) Program”) that provides interim guidance for agencies. Compliance with that guidance requires agencies to deviate from certain FAR requirements for the 8(a) Program, as established in **Attachment 1** of this AAPD.

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. SBA can make this affirmative determination of eligibility as a part of the offering and acceptance procedures outlined in FAR 19.804-2 and FAR 19.804-3.

## **V. Point of Contact**

COs may direct their questions about this AAPD to the ["Ask M/OAA/Policy"](#) Google Group.

## **VI. Attachments**

**Attachment 1:** Deviated FAR 19.804-3 Text

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<sup>3</sup> *Ultima Servs. Corp. v. Dep’t of Ag.*, No. 20-cv-0041 (E.D. Tenn.).

**Attachment 1: Deviated FAR 19.804-3 Text**

**Class Deviation No. M-OAA-DEV-FAR-23-03c**

*When awarding an 8(a) contract or order to an individual-owned small business participant that is not on the SBA “8(a) Social Disadvantage Qualification List,” the CO must follow the procedures at FAR subpart 19.8 regarding offer and acceptance under the 8(a) Program, including the FAR deviations to paragraphs 19.804-3(a)(1) and (a)(2) as shown below.*

*Baseline below is FAC 2023-05. Changes to baseline shown as in **bold**. 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.**

(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.**

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