



National Aeronautics and
Space Administration
Washington, DC 20546

Procurement Class Deviation

PCD 23-03

August 31, 2023

**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”**

(NASA Case 2023-N020)

PURPOSE: To affect a class deviation from the Federal Acquisition Regulation (FAR) and the NASA FAR Supplement (NFS), regarding SBA 8(a) Program offer and acceptance, specifically the deviations to FAR 19.804-3(a)(1) and (a)(2) and NFS 1819.804-3, as shown in the attachment to this class deviation.

BACKGROUND: This class deviation implements a court injunction issued by the United States District Court for the Eastern District of Tennessee on July 19, 2023, enjoining the use of the rebuttable presumption of social disadvantage in administering SBA’s 8(a) Program, and SBA’s memorandum issued on August 18, 2023. Due to the injunction, SBA must determine the eligibility of certain concerns for the 8(a) Program. Because of the court decision, this class deviation applies in lieu of the existing SBA and NASA Partnership Agreement with respect to the verification of 8(a) Participant eligibility for the purposes of offer and acceptance.

GUIDANCE:

As a result of the injunction, 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 (*i.e.*, 8(a) 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. For existing contracts awarded prior to July 19, 2023, utilizing 8(a) authority, an affirmative determination of social disadvantage by SBA is **not** necessary when-
 - i. Exercising a priced option,
 - ii. Issuing an in-scope modification, or
- d. For competitive 8(a) orders placed against existing 8(a) set-aside multiple-award contracts, GWACS, and FSS contracts, neither SBA acceptance nor the requirement to obtain a copy of the SBA qualification letter from the contractor is necessary.

ACTION REQUIRED BY CONTRACTING OFFICERS:

Contracting Officers (CO) can use the following resources to validate a contractor's 8(a) status:

- Contact Center Point of Contact (POC). Each Center should identify a Central POC(s) with a MAX.gov account for COs to request verification of a contractor's 8(a) status. The POC(s) would check the *SBA list of qualified 8(a) entities on [SBA OPPL Collaboration Page - Small Business Administration - MAX Federal Community](#)*. SBA has developed a list of qualified 8(a) entities on Max.gov ([MAX Registration](#)). As of today, the list includes over 1,000 qualified 8(a) entities and new entities are being added daily.
- Contact Center Small Business Specialist (SBS). If the CO has a MAX.gov account and encounters difficulty locating a specific contractor, they should request assistance from the Center Small Business Specialist (SBS).
- Contact SBA Procurement Center Representative (PCR). If the SBS is unavailable and the contractor is not on the list, the CO should contact the Center SBA PCR as a final alternative.

COs must include a copy of the SBA list of qualified 8(a) entities that verifies the company's status within the contract file.

EFFECTIVE DATE: This class deviation is effective immediately and remains in effect through December 31, 2023, or until rescinded, whichever occurs first.

PROVISION AND CLAUSE CHANGES: None

HEADQUARTERS CONTACT: R. Todd Lacks, Headquarters, Office of Procurement, Procurement Management and Policy Division, 202-358-0799, email: todd.lacks@nasa.gov.

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Enclosure

Deviation to FAR Text

Baseline is accurate through FAC 2023, effective on 09/22/2023

Additions shown in **[bold brackets]**;

Deletions shown as ~~strike throughs~~; and

FAR text unchanged shown as asterisks ***** or *******.

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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**PART 1819
SMALL BUSINESS PROGRAMS**

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**Subpart 1819.8 CONTRACTING WITH THE SMALL BUSINESS ADMINISTRATION
(THE 8(A) PROGRAM)**

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~~1819.804-3 SBA acceptance.~~

~~(a) Upon receipt of the contracting agency's offer, the SBA will determine whether to accept the requirement for the 8(a) Program. The SBA's decision whether to accept the requirement will be transmitted to the contracting agency in writing within five working days of receipt of the offer if the contract is likely to exceed the simplified acquisition threshold. The contracting agency may grant an extension of these time periods. For actions, above the simplified acquisition threshold and under \$20M, if SBA does not respond with a notification of rejection within five working days of receipt of an offer, the contracting activity may assume acceptance on the sixth working day. On actions greater than \$20 million, if an acceptance or rejection has not been received from the SBA District Office on the sixth working day, the contracting officer shall seek acceptance from the Associate Administrator of SBA's Office of Business Development (AA/BD). If a reply is not received from the AA/BD within five working days after the AA/BD receipt of the offer, on competitive actions the contracting officers may assume acceptance on the sixth working day.~~

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