

[9/19/23]

Continued Use of the 8(a) Program During the Ultima Injunction

Frequently Asked Questions

The questions and answers in this document are intended to help the federal workforce as it implements SBA's guidance on the impact of the district court's July 19, 2023 decision in *Ultima Servs. Corp. v. Dep't of Ag.* (E.D. Tenn.) on the 8(a) Program. These FAQs may be updated based on further developments. These FAQs do not create or confer any rights for or on any person. These FAQs do not impose any requirements beyond those required under applicable law and regulations.

Additional questions may be sent to 8aquestions@sba.gov, with "9.19 FAQs" as the subject line.

A. New requirements

1. Does the guidance require agencies to pause or otherwise slow their submission of new requirements for acceptance into the 8(a) Program?

No. Under the guidance, agencies can and should continue to submit new requirements for acceptance into the 8(a) Program.

2. Are all new 8(a) requirements subject to an affirmative determination by SBA prior to award that social disadvantage has been established without the presumption?

No. The *Ultima* injunction does not apply either to individual-owned small businesses that previously established social disadvantage without the use of the presumption or to small businesses that are entity-owned, which do not have to establish social disadvantage to participate in the program. Entity-owned small businesses include business concerns owned by Alaska Native Corporations, Indian tribes, Native Hawaiian Organizations, and Community Development Corporations (CDCs). SBA is publishing and updating a MAX.gov list of the 8(a) participants that fall into these categories. The processing of 8(a) awards made to these businesses will not be affected.

3. Is there a list of small businesses in the 8(a) program that have established social disadvantage without the use of the presumption which currently qualify for awards under 8(a) authorities?

SBA is making a list available for government-only review within OMB's MAX.gov platform. The MAX.gov list will include both individual-owned 8(a) participants and entity-owned participants. SBA also will send a letter to every current Program

Participant that it has identified as having established its individual social disadvantage and to entity-owned businesses, which do not have to establish social disadvantage in response to this injunction. This will include Participants that established their individual social disadvantage at the time of their application to the program and those that previously relied on the rebuttable presumption but have re-established their individual social disadvantage without the presumption after the *Ultima* decision. All Participants will be able to share that letter with procuring agencies before an 8(a) award occurs.

4. Are competitive 8(a) set-aside orders conducted under an existing 8(a) multiple award contract or government-wide acquisition contract with individual-owned small businesses subject to an affirmative determination of eligibility by SBA prior to award?

No. Eligibility for a competitive 8(a) order under an existing 8(a) multiple award contract or an 8(a) government-wide acquisition contract flows down from the underlying contract. Agencies do not offer and SBA does not accept such 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) MAS Pool on the GSA Federal Supply Schedule 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. More than 1,100 8(a) contractors are qualified to compete on the STARS GWAC and provide a wide range of IT services. These order awards do not require eligibility determinations by SBA.

Note that for competitive 8(a) awards outside of 8(a) ordering vehicles (e.g., an 8(a) competitive order under a multiple award contract that is not itself an 8(a) contract), the procuring agency must 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. This does not apply to awards that are made to 8(a) participants after full and open competition.

5. If an agency seeks to place a directed (sole source) award with an individual-owned small business – either on the open market or on an existing government-wide or agency contract – must SBA first verify the nominee's eligibility for award as part of its acceptance of the procurement into the 8(a) program?

Yes. For every sole source 8(a) award, SBA must verify that the nominee meets the social disadvantage requirement in connection with its acceptance. This includes the award of any 8(a) sole-source order, regardless of whether the underlying contract is an 8(a) contract.

B. Existing requirements

6. Must SBA make an affirmative determination of eligibility regarding ongoing contracts with individual-owned small businesses?

For any contract placed into the 8(a) Program prior to July 19, 2023 (the date of the court's order in *Ultima*), agencies may allow continued performance under the existing contract period, exercise priced options, and execute in-scope modifications without consulting with SBA.

7. If a contract was placed in the program after July 19, 2023, may an agency exercise a priced option or execute an in-scope modification without first receiving affirmation from SBA regarding the business' eligibility?

If a contract was placed into the program after July 19, 2023, it must either be awarded to a firm that doesn't need a new social disadvantage determination (i.e., entity-owned Participants, or individual-owned Participants that previously established their personal social disadvantage in their application to participate in the program) or to one whose social disadvantage has been determined by SBA after the decision in *Ultima* and prior to award. In either case, as with 8(a) contracts existing prior to July 19, 2023, agencies may allow continued performance under the existing contract period, exercise priced options, and execute in-scope modifications without consulting with SBA.

C. Contracting with Small Disadvantaged Businesses (SDBs) outside of the 8(a) Program

8. Are there any restrictions on contracting with SDBs outside of the 8(a) program as a result of the injunction?

No. The injunction does not 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 without additional verifications.

9. How can contracting officers maximize opportunities for SDBs outside the 8(a) Program?

Agencies should consider set-asides with WOSBs (see [FAR 19.1505](#)), HUBZone small business contractors ([FAR 19.1305](#)), and SDVOSBs (see [FAR 19.1405](#)). Approximately 65 percent of certified WOSBs, HUBZone, and certified SDVOSB small business contractors also self-represent as SDBs. Small business set-asides should also be considered – historically, about 30 percent of small business set-asides are won by SDBs.

D. Reducing procurement lead-time and barriers to entry for small businesses

10. What strategies might be used when conducting competitive small business set-asides to reduce procurement lead-times and improve accessibility to the marketplace for small businesses?

[FAR 1.102-4](#) provides authority to use flexible business strategies in procurements unless noted otherwise. Sample use cases and examples of tested innovative acquisition techniques can be found in the Periodic Table of Acquisition Innovations (PTAI): <https://fai.gov/periodic-table>. More than half of the listed strategies have been demonstrated to reduce burden and facilitate access for small businesses. Agency designated [Acquisition Innovation Advocates](#) can provide additional resources.

E. Additional FAQs added 9/19

11. If a firm is on SBA’s Social Disadvantage Qualification List, does the agency still need to submit an offer letter and wait for SBA’s review?

Yes. The agency should follow its partnership agreement with SBA, even if the awardee is on SBA’s Social Disadvantage Qualification List. This means sending an offer letter for a new 8(a) award exceeding the Simplified Acquisition Threshold (“SAT”) and waiting the specified period for SBA’s acceptance. During that time, SBA is confirming eligibility across several different factors. With the firm on SBA’s list, however, SBA will not need to perform a new social disadvantage review. The agency may presume acceptance for a firm on the list after waiting the required time period.

12. Does SBA prioritize the review of firms for the Social Disadvantage Qualification List and, if so, how?

Yes, SBA prioritizes reviews of firms referred by agencies as being in line for award. Agencies should send an 8(a) offer letter to the firm’s SBA District Office. If the firm is not yet on the list, SBA will expedite review.

13. How long does it take SBA to review the social disadvantage of a firm that is line for award but not yet on the Social Disadvantage Qualification List?

Review time varies depending on the complexity of the firm’s social disadvantage submission. As of 9/6, reviews are averaging 5 days. But SBA has expanded its review team substantially to speed up the process.

14. Can an agency use the 8(a) MAS Pool for competitive awards, without seeking SBA affirmation?

The 8(a) MAS Pool (gsa.gov/8aSSP) is available for both competitive and sole source awards. If an agency uses the Pool for a competitive award, the agency does not seek SBA affirmation of eligibility (see FAQ #4). But if the agency awards a sole-source order, the agency must send an offer letter to SBA. SBA will review social-disadvantage eligibility in that case, unless the firm already appears on the Social Disadvantage Qualification List.

15. Does the agency need to wait for an eligibility determination for actions below the SAT?

Yes, for firms not on the Social Disadvantage Qualification List, the agency must wait for SBA's 8(a) eligibility determination for new 8(a) awards below the SAT. The partnership agreement requires agencies to submit a request for an eligibility determination to SBA for below-SAT new awards. But typically, the agency is allowed to move forward if it does not hear back within 2-3 working days. Under the injunction procedures, however, an agency must wait for SBA to determine whether the firm is qualified for social disadvantage if the firm does not appear on the Social Disadvantage Qualification List. If the firm appears on the Social Disadvantage Qualification List, the agency can submit the request for eligibility and move forward after the required waiting period. During that waiting period, SBA is determining eligibility across factors other than social disadvantage.

16. How does an agency seek release of an existing requirement from the 8(a) program?

Before a requirement may be released from the 8(a) program, agencies still must abide by the requirements of 13 C.F.R. § 124.504(d) (see also FAR 19.815) and the partnership agreement, but SBA allows for agencies to request releases in order to award an existing requirement outside of the 8(a) program. Agencies should submit the request for release to the SBA District Office where the requirement was accepted. The release-request procedures require an agency to submit a justification and a history of the procurement, as well as other documentation. Refer to your agency's partnership agreement for the full procedures.

17. If an agency received an SBA acceptance letter prior to July 19, 2023, may the agency proceed with the 8(a) award?

Agencies other than USDA can proceed to award an 8(a) sole-source award based on an SBA acceptance letter received prior to July 19. USDA agencies should consult with their Counsel's Office.

If awarding a competitive 8(a) award, the agency must request an eligibility determination from SBA for the awardee, even if SBA accepted the requirement prior to July 19. As part of the eligibility determination, SBA will determine whether the awardee qualifies as socially disadvantaged.

18. How do I access the Social Disadvantage Qualification List?

The list is available on MAX.gov at the URL

<https://community.max.gov/display/SBA/SBA+OPPL+Collaboration+Page>.

Government employees can sign up at MAX.gov to access the [MAX.gov](https://community.max.gov/display/SBA/SBA+OPPL+Collaboration+Page) list using their PIV or CAC card. MAX.gov is only accessible by government employees. The list is available through the links above or by searching for "SBA OPPL Collaboration Page."

19. How do I use the Social Disadvantage Qualification List?

You must download the 8(a) Social Disadvantage Qualification List to your computer and open it as an html webpage. The list includes a search bar that you can use to search the Social Disadvantage Qualification List by UEI or Firm Name. The list also includes U.S. states for approved firms. SBA also provides on MAX.gov a Comma Separated Values (CSV) file that includes the same content. SBA updates the files daily as new firms are added.