

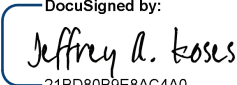


GSA Office of Government-wide Policy

8/25/2023

Class Deviation CD-2023-08

MEMORANDUM FOR: ALL GSA CONTRACTING ACTIVITIES

FROM: JEFFREY A. KOSES 
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OFFICE OF ACQUISITION POLICY (MV)

SUBJECT: FAR 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 memorandum approves a class deviation from the Federal Acquisition Regulation (FAR), regarding SBA 8(a) Program offer and acceptance, specifically the deviations to FAR 19.804-3(a)(1) and (a)(2) as shown in the attachment to this memorandum. Further, as a result of the court decision, this memorandum applies in lieu of the GSA and SBA Partnership Agreement with respect to the verification of 8(a) Participant eligibility for the purposes of offer and acceptance.

2. Background.

This memorandum and the FAR Class Deviation are in response to the recent court decision in *Ultima Services Corporation vs. USDA et al.*¹ and SBA guidance issued Friday, August 18, 2023.

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.

¹ 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. Social disadvantage and economic disadvantage is a component of 8(a) program participant eligibility. 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.

- 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, or
 - ii. Issuing an in-scope modification.

3. Authority.

This class deviation is issued under the authority of FAR 1.404 and General Services Administration Acquisition Manual (GSAM) 501.404.

This class deviation is issued following consultation with the Chair of the Civilian Agency Acquisition Council (CAAC) in accordance with FAR 1.404(a) and GSAM 501.404(a).

4. Applicability.

This class deviation applies to all GSA contracting activities.

5. Deviation.

See Attachment B of this document for a line-in/line-out of the areas of the FAR being amended by this class deviation.

6. Effective Date and Expiration Date.

This class deviation is effective immediately and remains in effect through December 31, 2023 or until rescinded by the SPE, whichever occurs first.

7. Point of Contact.

Any questions regarding this class deviation may be directed to GSARPolicy@gsa.gov.

Attachments Attachment A – [CAAC Letter 2023-04](#)
Attachment B – [FAR Class Deviation Line-In/Line-Out Text](#)

**ATTACHMENT B
FAR DEVIATION LINE-IN/LINE-OUT TEXT
FOR CLASS DEVIATION CD-2023-09**

FAR Baseline is accurate through: FAC 2023-05 effective on 09/22/2023

- Additions to baseline made by deviation are indicated by **[bold text in brackets]**
- Deletions to baseline made by deviation are indicated by ~~strikethroughs~~
- Five asterisks (* * * * *) indicate that there are no revisions between the preceding and following parts or sections
- Three asterisks (* * *) indicate that there are no revisions between the material shown within a section and subsection or subsection

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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