

SBA's 8(a) Business Development Program: Structure and Current Issues

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To address discriminatory barriers in federal procurement markets for certain business owners, Congress has sought to help small “socially and economically disadvantaged” businesses through the 8(a) Business Development Program. Statutory authority for the program is contained in Sections 7(j), 8(a), and 8(d) of the Small Business Act. The program was explicitly authorized by the 1978 amendments to the Small Business Act, although program activities were previously conducted through Small Business Administration (SBA) regulations.

For eligible businesses, the 8(a) program creates federal contracting preferences, such as contract set-asides and sole-source contracts. In addition to contracting preferences, the program provides participants with business development support, including mentorship, training, and counseling. These services are intended to enhance participants’ competitiveness and their long-term viability as businesses. A business may participate in the program for a total of nine years. A participating business may “graduate” from the program by reaching its business development goals or may exit the program after nine or fewer years. Once a participant has left the program, neither the firm nor the owner of that firm is eligible to participate in the program again.

Although many program firms are owned by socially and economically disadvantaged individuals, participating businesses may also be owned by socially and economically disadvantaged groups, including an Alaska Native Corporation (ANC), Native Hawaiian Organization (NHO), Community Development Corporation (CDC), or Indian tribe. Firms owned by ANCs, CDCs, NHOs, and Indian tribes are governed by many of the same regulations as other 8(a) firms but also have unique program benefits and requirements. For example, group-owned firms may receive sole-source awards in excess of the cap on such awards for individually-owned firms (\$4.5 million or \$7 million for manufacturing contracts).

The SBA accepts procurements from other federal agencies and may then award contracts to program participants through either a set-aside or a sole-source award, typically depending on the value of the contract award. Agency purchasing officials may choose to award contracts under this program in order to reach annual statutory goals for contracting with small socially and economically disadvantaged businesses.

The 8(a) program has faced a few issues that may be of interest to Congress, including a 2023 legal challenge to its interpretation of social disadvantage when reviewing program applications. Other issues of potential congressional interest include program performance evaluation and program reporting delays.

This report provides an overview of 8(a) program eligibility and participation requirements, contracting preferences and business development resources for 8(a) program participants, as well as SBA’s administration of the program. It also briefly introduces issues of congressional interest.

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Introduction

Through the 8(a) Business Development Program,¹ the Small Business Administration (SBA) accepts procurements from other federal agencies and subcontracts agency requirements to small businesses owned and controlled by *socially and economically disadvantaged* individuals and entities.² In addition to the federal contracting set-asides and sole-source awards for which the program is best known, the program provides participants with business development support, including mentorship, training, and counseling. These services are intended to enhance participants' competitiveness and their long-term viability as businesses. This report reviews the general program structure and its implementation, including the application process and participation requirements, and benefits and resources for firms accepted into the program. It also presents issues of potential congressional interest. A detailed history of the program's evolution is available in CRS Report R44844, *SBA's 8(a) Business Development Program: Legislative and Program History*.

Program Structure

Program Applicant and Participant Requirements

Program participation involves a significant application process, completed through SBA's Certify platform at certify.sba.gov. The SBA revised and streamlined the 8(a) Program's application process in 2016 by accepting online applications only (hard copy applications are no longer accepted).³ Once accepted, program participants must submit a variety of information to SBA as part of an annual review process. More information on participant reporting and annual review requirements is available in **Appendix B**.

Program Eligibility Requirements

Detailed statutory and regulatory requirements govern 8(a) program eligibility. These requirements are generally the same for all 8(a) firms, although there are instances where there are "special rules" for group-owned 8(a) firms, or firms owned by the following types of entities: Community Development Corporations (CDCs), Alaska Native Corporations (ANCs), Native Hawaiian Organizations (NHOs), and federally recognized Indian Tribes.⁴ **Appendix A** provides detailed program eligibility criteria. In general, eligible firms:

¹ The program is named for Section 8(a) of the Small Business Act, under which it was authorized in 1978 by P.L. 95-507, To Amend the Small Business Act and the Small Business Investment Act of 1958, 92 Stat. 1757 (October 24, 1978). The William J. Clinton Administration changed the program's name from the Minority Small Business and Capital Ownership Development Program to the 8(a) Business Development program in 1988 "to emphasize that individuals need not be members of minority groups and to stress the importance of assisting participating firms in their overall business development." See Small Business Administration (SBA), "Small Business Size Regulations: 8(a) Business Development/Small Disadvantaged Business Status Determinations; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals," 63 *Federal Register* 35727, June 30, 1998.

² The terms "socially disadvantaged" and "economically disadvantaged" are defined in the Small Business Act, codified at 15 U.S.C. §637(a)(5) and 15 U.S.C. §637(a)(6)(A) respectively. Business owners may be individuals or certain eligible group entities (see "Program Features Unique to Group-Owned Firms" for further discussion).

³ SBA, "Small Business Mentor Protégé Program," 81 *Federal Register* 48569, July 25, 2016.

⁴ 13 C.F.R. §124.111 (CDCs); 13 C.F.R. §124.109 (Indian Tribes and ANCs); 13 C.F.R. §124.110 (NHOs).

- are small in size, according to size standards established by the SBA;⁵
- are of “good character,” which relates to an applicant’s criminal conduct, their incarceration, parole, or probation pursuant to crimes involving business integrity, their violations of any SBA regulations, and their submission of false information to the SBA;
- demonstrate potential for success, which a firm can generally do by operating and receiving contracts in the private or public sectors, in its primary industry, for at least two full years immediately prior to applying for the program (although the SBA may waive this two-year requirement under certain conditions); and
- are at least 51% unconditionally and directly owned by one or more *socially and economically disadvantaged* individuals who are citizens of the United States (or owned by an ANC, NHO, CDC, or Indian tribe).⁶

Social and Economic Disadvantage

Program participants must be socially disadvantaged as well as economically disadvantaged. For program purposes, socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities.⁷ Prior to a July 2023 ruling in a federal district court case (*Ultima Servs. Corp. v. U.S. Department of Agriculture*), the SBA applied a “presumption of social disadvantage” to individuals applying for its 8(a) program from the following groups: Asian Pacific Americans, Black Americans, Hispanic Americans, Subcontinent Asian Americans, and Native Americans. Due to the district court ruling that the SBA cannot presume social disadvantage based on ethnic or racial group membership, the SBA stopped presuming social disadvantage. All program applicants must now submit a personal narrative to the SBA that demonstrates their social disadvantage, a procedure that had been required of individuals who were not members of one of the racial groups listed above.⁸

Economically disadvantaged individuals are those whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities.⁹ They must have a net worth of less than \$850,000 and an adjusted gross income averaged over the three preceding years of \$400,000 or less.¹⁰ Funds invested in an Individual Retirement Account (IRA) or other

⁵ The SBA’s size standards table is available at <https://www.sba.gov/document/support-table-size-standards> or in the *Code of Federal Regulations* at 13 C.F.R. §121.201. Firms may also look up their North American Industry Classification System (NAICS) code in the table or use the SBA’s Size Standards Tool, available at <https://www.sba.gov/size-standards/index.html>.

⁶ Eligibility criteria are described at 13 C.F.R. §124.109 for tribes and ANCs; at 13 C.F.R. §124.110 for NHOs; and at 13 C.F.R. §124.111 for CDCs.

⁷ 15 U.S.C. §637(a)(5).

⁸ For more information on the SBA’s response to the legal challenge, see CRS Insight IN12245, *SBA’s 8(a) Business Development Program Responds to District Court Ruling*, by R. Corinne Blackford. For information about the history of the 8(a) program’s definition of socially disadvantaged, see CRS Report R44844, *SBA’s 8(a) Business Development Program: Legislative and Program History*, by R. Corinne Blackford.

⁹ 15 U.S.C. §637(a)(6)(A).

¹⁰ 13 C.F.R. §124.104(c). These thresholds were established by SBA through regulations. They were most recently revised in 2022 (see SBA, “Small Business Size Standards: Adjustment of Monetary-Based Size Standards, Disadvantage Thresholds, and 8(a) Eligibility Thresholds for Inflation,” 87 *Federal Register* 69118-69154, November 17, 2022). For more information on the development of these thresholds, see CRS Report R44844, *SBA’s 8(a) Business Development Program: Legislative and Program History*, by R. Corinne Blackford.

official retirement account will not be considered in determining an individual's net worth. Ownership interest in the applicant firm and the equity in the individual's primary personal residence is excluded from net worth calculations as well. In addition, the fair market value of all their assets (including their primary residence and the value of the applicant firm) must not exceed \$6.5 million.¹¹

Small Disadvantaged Businesses and Disadvantaged Small Business Owners

Although all 8(a) program participants must be socially disadvantaged as well as economically disadvantaged, participants may be either individuals (a person or people) or one of four types of group-owned entities: Community Development Corporations (CDCs), Alaska Native Corporations (ANCs), Native Hawaiian Organizations (NHOs), and federally recognized Indian Tribes. All program participating firms are known as "Small Disadvantaged Businesses" (SDBs). SDB owners are known as either "disadvantaged individuals" or "disadvantaged entities." This report refers to "disadvantaged individuals" or to "group-owned firms" when discussing the different types of owners of SDBs.

One-Time Eligibility and Limits on Family Participation

Other eligibility regulations include one-time eligibility for the program and limits on ownership by family members of current or former 8(a) firm owners. Once a firm or a disadvantaged individual upon whom a firm's eligibility was based has exited the program after participating in it for any length of time, neither the firm nor the individual is eligible to participate in the program again.¹² Firms are considered identical for purposes of program eligibility when at least 50% of the assets of one firm are the same as those of another firm.¹³ Individuals may not use their disadvantaged status to qualify a firm for the program if the individual has an immediate family member who is using, or has used, disadvantaged status to qualify a firm for the program.¹⁴

Program Features Unique to Group-Owned Firms

Firms owned by ANCs, CDCs, NHOs, and Indian tribes are governed by many of the same regulations as other 8(a) firms, including the maximum participation period of nine years.¹⁵

Requirements for group-owned firms differ somewhat from individually-owned 8(a) firms, including with respect to one-time eligibility for the program. Any given firm owned by an ANC, CDC, NHO, or Indian tribe may participate in the 8(a) program once, but these entities may own multiple firms.¹⁶ This is because disadvantaged groups may confer their eligibility status upon firms on multiple occasions, and for an indefinite period—with some conditions.¹⁷

¹¹ 13 C.F.R. §124.104(c).

¹² 15 U.S.C. §636(j)(11)(B)-(C); and 13 C.F.R. §124.108(b).

¹³ 13 C.F.R. §124.108(b)(4).

¹⁴ 13 C.F.R. §124.105(g)(1). SBA may waive this prohibition if the firms have no connections in terms of ownership, control, or contractual relationships and certain other conditions are met.

¹⁵ 13 C.F.R. §124.109(a) and (b) (requiring tribally and ANC-owned firms to comply with the general eligibility requirements where they are not contrary to or inconsistent with special requirements for these entities); 13 C.F.R. §124.110(a) (similar provision for NHO-owned firms); and 13 C.F.R. §124.111(a) (similar provision for CDC-owned firms).

¹⁶ 13 C.F.R. §124.109(a) and (b) (ANC- and tribally-owned firms); 13 C.F.R. §124.110(a) (NHO-owned firms); and 13 C.F.R. §124.111(a) (CDC-owned firms).

¹⁷ 15 U.S.C. §636(j)(11)(B)-(C).

The conditions of multi-firm ownership relate to who may perform day-to-day firm management and in what industries firms may operate. The managers responsible for the “daily operations” of an ANC-, NHO-, or tribally-owned firm may not manage more than two 8(a) firms at the same time.¹⁸ Also, groups may not own 51% or more of another firm that “either at the time of [8(a) program] application or within the previous two years,” obtains the majority of its revenue from the same “primary” industry as another one of its firms.¹⁹ However, group-owned entities may own multiple firms that “conduct secondary business” in the same industry,²⁰ and that earn less than 50% of their revenue in the same primary industry.²¹

Program Participation Requirements

Continuing Eligibility Certification

Once accepted into the program, participating firms must certify their continuing eligibility to remain in the program through an annual review process.²² Participants submit a variety of information to the SBA through their SBA District Office, including personal financial information for each disadvantaged business owner and a report for each 8(a) contract performed during the year.²³ In addition to these requirements for participants, if the SBA receives “specific and credible information alleging that a Participant no longer meets the eligibility requirements for continued program eligibility,” the SBA is to review a participant’s eligibility.²⁴

Program Stages and Revenue Targets

As they progress through the program, firms complete stages of business development that are tied to non-8(a) revenue targets (i.e., revenue received outside of 8(a) contracts). Program participation is divided into two stages, a “developmental stage” of four years and a “transitional stage” of five years.²⁵ In the transitional stage, program participants must actively pursue non-8(a) contracts in order to reach required annual targets for non-8(a) revenue. These targets increase over time: 15% of their revenue from non-8(a) sources in the fifth year, 25% in the sixth year, 30% in the seventh year, 40% in the eighth year, and 50% in the ninth year.²⁶ The goal is for firms to successfully compete for federal contracts without 8(a) program assistance after completing the program by the ninth year, and “not [to] develop an unreasonable reliance on 8(a) awards, and to

¹⁸ 13 C.F.R. §124.109(c)(4)(iii) (ANC- and tribally-owned firms); 13 CFR 124.110(d)(3) (NHO-owned firms).

¹⁹ 13 C.F.R. §124.109(c)(3)(ii) (tribally and ANC-owned firms); 13 C.F.R. §124.110(f) (NHO-owned firms); and 13 C.F.R. §124.111(d) (CDC-owned firms). According to SBA regulations, sharing a primary industry means sharing a primary six-digit NAICS code with the same corresponding size standard. There are no limits on the number of firms group-owned entities may own that operate in other industries. Regulations also provide that an 8(a) firm owned by an ANC, CDC, NHO, or Indian tribe may not, within its first two years in the 8(a) program, receive a sole-source contract that is a follow-on to an 8(a) contract currently performed by an 8(a) firm owned by that entity, or previously performed by an 8(a) firm owned by that entity that left the program within the past two years. In addition, there are restrictions on the percentage of work that may be performed by any non-8(a) venturer(s) in joint ventures involving 8(a) firms (see 13 C.F.R. §124.513(d)).

²⁰ 13 C.F.R. §124.111(d).

²¹ 13 C.F.R. §124.109(c)(3)(ii) (tribally and ANC-owned firms); 13 C.F.R. §124.110(e) (NHO-owned firms); 13 C.F.R. §124.111(d) (CDC-owned firms).

²² 13 C.F.R. §124.112.

²³ 13 C.F.R. §124.112(b).

²⁴ 13 C.F.R. §124.112(c).

²⁵ 13 C.F.R. §124.404(a).

²⁶ 13 C.F.R. §124.509(b).

ease their transition into the competitive marketplace after graduating.”²⁷ Firms that do not display the relevant percentages of revenue from non-8(a) sources are ineligible for sole-source 8(a) contracts “unless and until” they correct the situation.²⁸ Group-owned firms are subject to the same revenue targets at various stages of their participation in the program as other 8(a) firms.²⁹

Participant Business Plans

Each program participant “must develop a comprehensive business plan setting forth its business targets, objectives, and goals,” in order “to assist the SBA servicing office in determining the business development needs of its portfolio [of program] Participants.”³⁰ Business plans are due “as soon as possible after program admission.”³¹ They may be modified and must be reviewed annually with the SBA, as part of a process that includes forecasting a firm’s contracting needs.³²

Program Withdrawals and Graduations

8(a) firms may leave the program by any of the following means, including through “graduation” at the end of the program period. Firms may exit through:

- voluntary withdrawal;
- voluntary early graduation (where the firm voluntarily decides to leave the program after the SBA has determined that the firm has substantially achieved its business plan’s targets, objectives, and goals and has demonstrated the ability to compete in the marketplace without program assistance);
- involuntary early graduation (where the SBA requires a firm to leave the program because it has determined that the firm has substantially achieved its business plan’s goals, demonstrated the ability to compete in the marketplace without assistance, exceeded the relevant size standard, or is no longer economically disadvantaged);³³
- termination for good cause;³⁴

²⁷ 13 C.F.R. §124.509(a)(1).

²⁸ 13 C.F.R. §124.509(d)(1). This prohibition may be waived if the Office of Business Development’s director determines that denial of a sole-source contract would cause severe economic hardship for the firm, potentially jeopardizing its survival, or if extenuating circumstances beyond the firm’s control caused it to miss its target (13 C.F.R. §125.509(e)).

²⁹ 13 C.F.R. §124.509.

³⁰ 13 C.F.R. §124.402(a).

³¹ 13 C.F.R. §124.402(b).

³² 13 CFR 124.403(a)-(b). A contract forecast provides, in writing, a firm’s needs for contract awards for the next program year, including the aggregate dollar value of 8(a) contracts to be sought, and the aggregate dollar value of non-8(a) contracts to be sought.

³³ 13 C.F. R. §124.302.

³⁴ Examples of termination for good cause include submission of false information in the firm’s application materials; failure to maintain eligibility for program participation; failure to pursue competitive and commercial business in accordance with its business plan, or failure in other ways to make reasonable efforts to develop and achieve competitive viability; a pattern of inadequate performance of awarded Section 8(a) contracts; failure to pay or repay significant financial obligations owed to the federal government; failure to obtain and keep current any and all required permits, licenses, and charters needed to operate the business; unauthorized use of SBA direct or guaranteed loan proceeds or violation of an SBA loan agreement; and willful violation by a concern, or any of its principals, of any SBA regulation pertaining to material issues (13 C.F.R. 124.303(a)(1-20) and (b)).

- expiration of the program term (maximum of nine years) without meeting the SBA's graduation requirements;³⁵ or
- graduation at the expiration of the program term. Firms may participate in the program for no more than nine years³⁶ from the date of their admission, although they may be terminated or graduate from the program before nine years have passed.³⁷

Contracting Preferences for Program Participants

Set-Asides and Sole-Source Awards

A set-aside award is a contract awarded in which only certain contractors may compete, whereas a sole-source award is a contract awarded, or proposed for award, without competition.³⁸ The Competition in Contracting Act (CICA)³⁹ generally requires federal agencies to allow full and open competition through the use of competitive procedures when procuring goods or services. However, set-aside and sole-source awards to 8(a) firms are permissible under CICA under certain circumstances. An 8(a) set-aside is a recognized competitive procedure.⁴⁰ CICA also permits sole-source awards when such awards are made pursuant to a procedure expressly authorized by statute, or when special circumstances exist.⁴¹ Agencies are effectively encouraged to subcontract through the 8(a) program because there are government-wide and agency-specific goals for the annual percentage of procurement dollars awarded to small disadvantaged businesses (SDBs), a category that includes all 8(a) firms (the statutory government-wide goal is 5%).⁴²

³⁵ 13 C.F.R. §124.2.

³⁶ In an effort to assist small businesses adversely affected by the novel coronavirus disease (COVID-19) pandemic, P.L. 116-260 provided businesses participating in the 8(a) program on or before September 9, 2020, the option to extend their participation in the program for one year. The extension did not apply to businesses that were terminated, graduated early, or voluntarily withdrew from the program (see SBA, "Extension of Participation in 8(a) Business Development Program," 86 *Federal Register* 2530, January 13, 2021).

³⁷ 15 U.S.C. §636(j)(15) (nine-year term); 13 C.F.R. §124.301 (exiting the program); 13 C.F.R. §124.302 (early graduation); and 13 C.F.R. §124.303 (termination).

³⁸ Set-asides may be total or partial. See 48 C.F.R. §19.501(a).

³⁹ P.L. 98-369, §§2701-2753.

⁴⁰ 10 U.S.C. §2304(b)(2); 41 U.S.C. §3303(b) (the Competition in Contracting Act (CICA) provisions authorizing set-asides for small businesses); and 48 C.F.R. §§6.203-6.207 (set-asides for small business generally, 8(a) small businesses, Historically Underutilized Business Zone [HUBZone] small businesses, service-disabled veteran-owned small businesses, and women-owned small businesses). CICA authorizes competitions excluding all sources other than small businesses when such competitions assure that a "fair proportion of the total purchases and contracts for property and services for the Federal Government shall be placed with small business concerns" (41 U.S.C. §3104).

⁴¹ 10 U.S.C. §2304(c)(1) (defense agency procurements); and 41 U.S.C. §§3301 and 3304(a) (civilian agency procurements).

⁴² 13 C.F.R. §124.1001 (defining "small disadvantaged business"). The federal government uses aspirational procurement goals instead of requiring federal agencies to award specific percentages of federal contracts to various types of small businesses primarily to avoid legal challenges under the equal protection component of the Fifth Amendment's Due Process Clause. See, for example, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Peña* 515 U.S. 200 (1995). For more information on statutory small business contracting goals, see CRS Insight IN12018, *Federal Small Business Contracting Goals*, by R. Corinne Blackford, and CRS Report R45576, *An Overview of Small Business Contracting*, by R. Corinne Blackford.

Award Limitations

Both set-asides and sole-source awards have limitations, and may only be made in certain circumstances. Sole-source awards also have dollar value caps, for individual contracts and for the total amount received by any one firm.

An 8(a) sole-source award, including options, must not exceed:

- \$4.5 million, or
- \$7 million in the case of manufacturing contracts.⁴³

In addition, individually-owned firms (vs. group-owned firms) may not receive additional 8(a) sole-source awards once they have been awarded a combined total of competitive and sole-source awards in excess of:

- \$168,500,000 during its participation in the program.⁴⁴

Once awarded more than \$168,500,000 in 8(a) contract awards, participant firms owned by individuals may not receive any additional 8(a) sole-source awards, though they can still receive set-asides.⁴⁵ The SBA will not count awards less than the “simplified acquisition threshold” (\$250,000) toward this limit.⁴⁶ Firms owned by ANCs, CDCs, NHOs, and Indian tribes are not subject to this maximum total award amount and may continue to receive sole-source awards beyond it.⁴⁷

The SBA is barred from awarding an 8(a) contract, either via a set-aside or on a sole-source basis, if the cost to the contracting agency exceeds “a fair market price.”⁴⁸ Additional prohibitions on the SBA accepting 8(a) contracts exist, although agencies can generally offer contracts to the SBA “in [their] discretion,”⁴⁹ and the SBA may accept them “whenever it determines such action is necessary or appropriate.”⁵⁰

Group-Owned Set-Asides and Sole-Source Awards

Firms owned by ANCs and Indian tribes can receive sole-source awards in excess of \$4.5 million (\$7 million for manufacturing contracts) even when contracting officers reasonably expect that at least two eligible and responsible 8(a) firms will submit offers and the award can be made at fair market price.⁵¹

⁴³ 48 C.F.R. §19.805-1(a)(2). The Federal Acquisition Regulatory Council has the responsibility of adjusting each acquisition-related dollar threshold (including those for the 8(a) program), on October 1, of each year that is evenly divisible by five (13 C.F.R. §124.506 (a); and 41 U.S.C. §1908(c)(2)).

⁴⁴ 13 C.F.R. §124.519(a). The SBA may waive this limit “where the head of a procuring activity represents that award of a sole source 8(a) contract to the Participant is needed to achieve significant interests of the Government” (13 C.F.R. §124.519(e)).

⁴⁵ 13 C.F.R. §124.519(c).

⁴⁶ 13 C.F.R. §124.519(b)(2); 48 C.F.R. §2.101 (defines the “simplified acquisition threshold”).

⁴⁷ 48 C.F.R. §19.805-1(b)(2); 13 C.F.R. §124.506(b); 48 C.F.R. §219.805-1(b)(2)(A)-(B).

⁴⁸ 15 U.S.C. §637(a)(1)(A); 48 C.F.R. §19.806(b).

⁴⁹ See “Federal Agency Discretion to Use the 8(a) Program.”

⁵⁰ 15 U.S.C. §637(a)(1)(A).

⁵¹ P.L. 100-656, §602(a), 102 Stat. 3887-88 (November 15, 1988) (codified at 15 U.S.C. §637 note); and 48 C.F.R. §19.805-1(b)(2); 13 C.F.R. §124.506(b).

P.L. 111-84 requires federal contracting officers to provide written justifications, obtain higher-level agency approvals, (continued...)

NHO-owned firms may receive sole-source awards from the Department of Defense under the same conditions.⁵²

If a sole-source award to a group-owned firm reaches a certain threshold, a contracting officer must create a written justification and receive approval for the award.⁵³ These thresholds are:

- \$25,000,000, or
- \$100,000,000 for the Department of Defense.⁵⁴

Additionally, as mentioned above, firms owned by ANC, CDC, NHO, and Indian tribes may continue to receive additional sole-source awards even after they have received a combined total of competitive and sole-source 8(a) contracts in excess of \$168,500,000.⁵⁵

Business Development Resources for Participants

Technical Assistance Through the Empower to Grow Program

8(a) program participants receive training and technical assistance through the SBA's Empower to Grow program, formerly known as the 7(j) Management and Technical Assistance Program.⁵⁶ The 7(j) program's origin dates back to 1970 when the SBA issued regulations creating the 8(a) contracting program.⁵⁷ Per statutory authority under Section 7(j) of the Small Business Act to provide management and technical assistance through contracts, grants, and cooperative agreements, the regulations specified that "the SBA may provide technical and management assistance to assist in the performance of the subcontracts."⁵⁸

Today, the Empower to Grow program "provides eligible disadvantaged U.S. small businesses with free business courses, tailored training, and one-on-one consulting to support their growth, operations, hiring, regulatory compliance, and government contracting competitiveness."⁵⁹

and provide notices for sole-source contracts in excess of \$20 million. The \$20 million threshold was increased through a regulatory update to \$22 million, effective October 1, 2015, and to \$25 million, effective October 1, 2020, to account for inflation. P.L. 116-92 increased this threshold to \$100 million for Department of Defense contracts.

⁵² Differences between NHO and ANC/tribal sole-source benefits were legislated. DOD's authority to make sole-source awards to NHO-owned firms in excess of \$4.5 million (\$7 million for manufacturing contracts) existed on a temporary basis from 2004 to 2006, and became permanent in 2006. See P.L. 109-148, Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, §8020, 119 Stat. 2702-03 (December 30, 2005) ("[Provided] [t]hat, during the current fiscal year and hereafter, businesses certified as 8(a) by the Small Business Administration pursuant to section 8(a)(15) of Public Law 85-536, as amended, shall have the same status as other program participants under section 602 of P.L. 100-656 ... for purposes of contracting with agencies of the Department of Defense."); 48 C.F.R. §219.805-1(b)(2)(A)-(B).

⁵³ 48 C.F.R. §6.303-1; 48 C.F.R. §6.304. The amount of the award determines the official who must provide approval, with larger awards requiring approval from higher-level officials.

⁵⁴ 13 C.F.R. §124.506(b)(5); 48 C.F.R. §219.808-1(a).

⁵⁵ 13 C.F.R. §124.519(a).

⁵⁶ SBA, "About Empower to Grow" and "8(a) Business Development Program," accessed 7/1/2024. The SBA's 7(j) program dates back to 1970 when the SBA issued regulations, using its statutory authority under Section 7(j) of the Small Business Act, to create the 8(a) contracting program to "assist small concerns owned by disadvantaged persons to become self-sufficient, viable businesses capable of competing effectively in the market place." 13 C.F.R. §124.8-1(b) (1970); and Notes, "Minority Enterprise, Federal Contracting, and the SBA's 8(a) Program: A New Approach to an Old Problem," *Michigan Law Review*, vol. 71, no. 2 (December 1972), pp. 377, 378.

⁵⁷ 13 C.F.R. §124.8-1(b) (1970); and Notes, "Minority Enterprise, Federal Contracting, and the SBA's 8(a) Program: A New Approach to an Old Problem," *Michigan Law Review*, vol. 71, no. 2 (December 1972), pp. 377, 378.

⁵⁸ 13 C.F.R. §124.8-1(d) (1970).

⁵⁹ SBA, "About Empower to Grow," accessed 7/1/2024, at <https://www.sba.gov/sba-learning-platform/empower-grow>.

Eligible businesses include those that meet SBA size standards and “which are located in urban or rural areas with a high proportion of unemployed or low-income individuals, or which are owned by such low-income individuals,” as well as 8(a) program participants.⁶⁰

SBA regulations indicate that assistance is offered “through its private sector service providers” and include “counseling and training in the areas of financing, management, accounting, bookkeeping, marketing, and operation of small business concerns,” as well as “the identification and development of new business opportunities.”⁶¹ Information on the numbers of firms assisted is available in the SBA’s annual *Congressional Budget Justification and Annual Performance Report*.⁶² The program is funded through a combination of directed appropriations and the SBA’s salaries and expenses account.

SBA Mentor-Protégé Program

The SBA established an 8(a) Mentor-Protégé Program in 1998 to “enhance the capabilities” of 8(a) firms and “improve [their] ability to successfully compete for contracts.”⁶³ It was merged into the SBA’s All Small Mentor-Protégé Program for non-8(a) firms on November 16, 2020.⁶⁴ The SBA merged the programs in an effort to “eliminate confusion regarding perceived differences between the two programs, remove unnecessary duplication of functions within SBA, and establish one, unified staff to better coordinate and process mentor-protégé applications.”⁶⁵

Today the program is known as the Mentor-Protégé Program⁶⁶ and SBA regulations govern who may qualify as a mentor or protégé, and the content of written agreements between mentors and protégés.⁶⁷

A protégé must:

- be a small business with industry experience,
- have a proposed mentor prior to applying for the program,
- be organized for profit or as an agricultural cooperative, and

⁶⁰ 13 C.F.R. §124.703.

⁶¹ 13 C.F.R. §124.702.

⁶² SBA, “Congressional Budget Justification and Annual Performance Report,” at <https://www.sba.gov/document/report-congressional-budget-justification-annual-performance-report>.

⁶³ SBA, “Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals: Final Rule,” 63 *Federal Register* 35739, June 30, 1998.

⁶⁴ 13 C.F.R. §124.520(a). See also GAO, *Small Business: SBA Could Better Focus Its 8(a) Program to Help Firms Obtain Contracts*, GAO/RCED-00-196, July 20, 2000, p. 14; and SBA, “Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments,” 85 *Federal Register* 66146-66199, October 16, 2020. The All Small Mentor-Protégé Program’s requirements essentially matched those of the 8(a) Mentor-Protégé Program; the only major difference was that the 8(a) Mentor-Protégé Program was limited to 8(a) program participants.

⁶⁵ SBA, “Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments,” 84 *Federal Register* 60846, November 8, 2019; and SBA, “Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments,” 85 *Federal Register* 66146-66199, October 16, 2020.

⁶⁶ This program is distinct from agency-specific mentor-protégé programs, which are generally administered by the agency’s Office of Small and Disadvantaged Business Utilization (OSDBU) and may involve coordination with agency contracting offices.

⁶⁷ A list of active mentor-protége agreements is available from the SBA at <https://www.sba.gov/document/support-active-mentor-protége-agreements>. Agency contracting officials may use this list for market research.

- have had no more than two mentors in the business's lifetime.⁶⁸

A mentor must:

- be organized for profit or as an agricultural cooperative,
- demonstrate that it is capable of carrying out its responsibilities to assist the protégé,
- possess good character and a favorable financial position,
- not be on the federal list of debarred or suspended contractors or affiliated with the protégé at the time of application or for any reason other than the mentor-protégé agreement, and
- have no more than three protégés at a time.⁶⁹

Furthermore, the SBA “must determine that the mentor-provided assistance will promote real developmental gains for the protégé, not just act as a vehicle to receive federal small business set-asides.”⁷⁰

Protégé benefits include financial assistance in the form of equity investments (of up to 40% of the protégé's business); assistance navigating federal contract bidding, acquisition, and performance process; and general and administrative assistance, such as human resource sharing or security clearance support.⁷¹ “Mentors are encouraged to provide assistance relating to the performance of contracts set aside or reserved for small business so that protégé firms may more fully develop their capabilities.”⁷²

The primary benefit for mentors is that they may form joint ventures with protégés that qualify for small business set-aside contracts for which the small business is eligible, including contracts set aside for 8(a) program participants.⁷³

Mentor-protégé agreements may last for no more than six years, and any changes to the agreement must be approved by the SBA in advance.⁷⁴ An applicant protégé and its prospective mentor may not be affiliated at the time of application but an applicant must apply with a “prospective mentor” identified, because the program is “not a matchmaking program.”⁷⁵

8(a) Program Administration

8(a) program administration by the SBA involves both activities related to program participants as well as agency procurement through the program. For participants, the SBA handles program admission processes, continuing eligibility and monitoring, as well as business development services. For agency purchasing units, the SBA provides Small Disadvantaged Business (SDB) vendors via its Section 8(a) subcontracting authority. SBA's Office of Business Development (BD) handles various aspects of the program, and is housed within the Office of Government

⁶⁸ SBA, “SBA Mentor-Protégé Program,” at <https://www.sba.gov/federal-contracting/contracting-assistance-programs/all-small-mentor-protege-program>. For additional information concerning program requirements, see 13 C.F.R. §125.9.

⁶⁹ 13 C.F.R. §125.9; and SBA, “SBA Mentor-Protégé Program.”

⁷⁰ SBA, “SBA Mentor-Protégé Program.”

⁷¹ 13 C.F.R. §125.9; and SBA, “SBA Mentor-Protégé Program.”

⁷² 13 C.F.R. §125.9(a).

⁷³ 13 C.F.R. §125.9; and SBA, “SBA Mentor-Protégé Program.”

⁷⁴ 13 C.F.R. §125.9(e)(5) and (7).

⁷⁵ SBA, “SBA Mentor-Protégé Program.”

Contracts and Business Development.⁷⁶ The SBA District Office serving “the geographical territory where a Participant’s principal place of business is located” provides program services to firms participating in the program.⁷⁷

SBA personnel known as Business Opportunity Specialists (BOSs) are located at SBA’s District Offices.⁷⁸ They assist both prospective and existing 8(a) firms with questions related to the application process, required forms, and the program’s various eligibility, reporting, and performance requirements.⁷⁹

Procurement Through 8(a) Mechanisms

On the procurement side of 8(a) program operations, SBA subcontracts to program participants on behalf of other federal agencies. Section 8(a) of the Small Business Act authorizes agencies to award contracts for goods or services, or to perform construction work, to the SBA for subcontracting to 8(a) firms. The act also authorizes the SBA to delegate the function of executing contracts to the procuring agencies, and it often does so.⁸⁰

Once the SBA has accepted a contract for the 8(a) program, the contract is awarded through either a set-aside or on a sole-source basis, with the contract amount generally determining the acquisition method used. **Table 1** summarizes the preference types that correspond with different award value thresholds.

Table 1. 8(a) Contract Award Method by Award Value Threshold

Award Value Threshold	Award/Preference Type	Criteria
Less than \$4.5 million (\$7 million for manufacturing contracts)	Sole-source award	Provided that (1) the firm is determined to be a responsible contractor for performance of the contract; (2) the award of the contract would be consistent with the firm’s business plan; and (3) award of the contract would not result in the firm exceeding the percentage of revenue from 8(a) sources forecast in its annual business plan.

⁷⁶ SBA’s Office of Business Development (BD) has three offices: the Office of Certification and Eligibility (OCE), the Office of Management and Technical Assistance (OMTA); and the Office of Program Review (OPR). OCE provides program participants recommendations concerning initial and continuing program eligibility. OMTA administers most of the services that are not provided by SBA District Offices, such as servicing sole-source, competitive, and multiple-award contracts; mentor/protégé applications and reconsiderations; and overseeing and coordinating technical and management training assistance. OPR supports both 8(a) headquarters and field office staff. SBA, Office of Business Development, “Standard Operating Procedure for the Office of Business Development,” SOP 80 05 5, effective September 23, 2016, pp. 29-31.

⁷⁷ 13 C.F.R. §124.401. States and territories have an SBA District Office staffed by various SBA personnel. Some larger states have more than one District Office (e.g., California and Texas each have six District Offices). SBA, “SBA District Offices,” accessed 6/28/2024, <https://www.sba.gov/about-sba/sba-locations/sba-district-offices>.

⁷⁸ SBA, “SBA District Offices,” accessed 6/28/2024, <https://www.sba.gov/about-sba/sba-locations/sba-district-offices>.

⁷⁹ SBA, OIG, *SBA Business Development Assistance to 8(a) Program Participants*, Report No. 22-08, February 14, 2022, pp. 21-22, at <https://www.sba.gov/document/report-22-08-sbas-business-development-assistance-8a-program-participants>.

⁸⁰ 13 C.F.R. §124.501(a); Partnership Agreement Between the U.S. Small Business Administration and the U.S. Department of Defense, January 7, 2013, at [https://www.acq.osd.mil/dpap/policy/policyvault/8\(a\)_Partnership_Agreement.pdf](https://www.acq.osd.mil/dpap/policy/policyvault/8(a)_Partnership_Agreement.pdf).

Award Value Threshold	Award/Preference Type	Criteria
Above \$4.5 million (\$7 million for manufacturing contracts)	Contract set-aside (8(a)-competed)	Provided that there is a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers and the award can be made at fair market price.

Source: CRS analysis of SBA regulations, Federal Acquisition Regulation, and Small Business Act provisions.

Notes: Requests to compete 8(a) contracts under the threshold (\$4.5 or \$7 million) may be made to the SBA but “will be approved only on a limited basis and will be primarily granted where technical competitions are appropriate or where a large number of responsible 8(a) participants are available for competition” (48 C.F.R. §19.805-1(d)).

When the contract’s anticipated total value, including any options, is less than \$4.5 million (\$7 million for manufacturing contracts), the contract is normally awarded without competition.⁸¹ In contrast, when the contract’s anticipated value exceeds these thresholds, the contract generally must be awarded via a set-aside with competition limited to 8(a) firms so long as there is a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers and the award can be made at fair market price.⁸²

Federal Agency Discretion to Use the 8(a) Program

There are few limits on agency discretion to use the 8(a) program.⁸³ However, the SBA is prohibited by regulation from accepting procurements for 8(a) awards when:

1. the procuring agency issued a solicitation for or otherwise expressed publicly a clear intent to reserve the procurement as a set-aside for small businesses not participating in the program prior to offering the requirement to the SBA for award as an 8(a) contract;⁸⁴
2. the procuring agency competed the requirement among 8(a) firms prior to offering the requirement to the SBA and receiving the SBA’s acceptance of it;⁸⁵
or

⁸¹ 48 C.F.R. §19.805-1; and 15 U.S.C. §637(a)(16)(A). A noncompetitive (sole-source) award may be made under this authority so long as (1) the firm is determined to be a responsible contractor for performance of the contract; (2) the award of the contract would be consistent with the firm’s business plan; and (3) award of the contract would not result in the firm exceeding the percentage of revenue from 8(a) sources forecast in its annual business plan (15 U.S.C. §637(a)(16)(A)(i)-(iii)).

⁸² 15 U.S.C. §637(a)(1)(D)(ii); 48 C.F.R. §19.805-1(a). However, competitive awards for contracts whose anticipated value is less than \$4.5 million (\$7 million for manufacturing contracts) can be made with the approval of the SBA’s Associate Administrator for 8(a) Business Development. 15 U.S.C. §637(a)(1)(D)(i)(I)-(II); 48 C.F.R. §19.805-1(d). Requests to compete 8(a) contracts under the sole-source cap “will be approved only on a limited basis and will be primarily granted where technical competitions are appropriate or where a large number of responsible 8(a) participants are available for competition” (48 C.F.R. §19.805-1(d)).

⁸³ AHNTECH, Inc., B-401092 (April 22, 2009) (“The [Small Business] Act affords the SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program.”).

⁸⁴ Even in this situation, SBA may accept the requirement under “extraordinary circumstances.” 13 C.F.R. §124.504(a); Madison Services, Inc., B-400615 (December 11, 2008) (finding that extraordinary circumstances existed when the agency’s initial small business set-aside was erroneous and did not reflect its intentions).

⁸⁵ However, offers of requirements below the simplified acquisition threshold (generally \$150,000) are assumed to have been accepted if SBA does not reply within two days. 13 C.F.R. §124.503(a)(4)(i). See also Eagle Collaborative Computing Services, Inc., B-401043.3 (January 28, 2011) (finding that an agency properly awarded a sole-source contract valued below the simplified acquisition threshold even though the SBA never formally accepted the requirements).

3. the SBA makes a written determination that “acceptance of the procurement for 8(a) award would have an adverse impact on an individual small business, a group of small businesses located in a specific geographical location, or other small business programs.”⁸⁶

In addition, the SBA is barred from awarding an 8(a) contract, either via a set-aside or on a sole-source basis, “if the price of the contract results in a cost to the contracting agency which exceeds a fair market price.”⁸⁷

Otherwise, agency officials may offer contracts to the SBA “in [their] discretion,” and the SBA may accept requirements for the 8(a) program “whenever it determines such action is necessary or appropriate.”⁸⁸ The courts and the Government Accountability Office (GAO) will generally not hear protests of agencies’ decisions to procure specific requirements through the 8(a) program unless it can be shown that government officials acted in bad faith or contrary to federal law.⁸⁹

Congressional Issues

The 8(a) program has faced a few developing issues that may be of interest to Congress, including a constitutional challenge to the definition of social disadvantage used in the program. Other issues of potential congressional interest include performance measures for evaluating the program’s success and program reporting delays.

Legal Challenge to Presumption of Social Disadvantage

In a July 2023 district court case, *Ultima Servs. Corp. v. U.S. Department of Agriculture*, the U.S. District Court for the Eastern District of Tennessee found SBA’s presumption of social disadvantage for certain 8(a) program applicants to be unconstitutional.⁹⁰ Prior to the ruling, the SBA applied a “presumption of social disadvantage” to individuals applying for its 8(a) program from the following groups: Asian Pacific Americans, Black Americans, Hispanic Americans, Subcontinent Asian Americans, and Native Americans.⁹¹ Thus, to establish “social disadvantage” for the program, applicants were required to either attest to membership in one of these groups, or provide a personal narrative to the SBA establishing social disadvantage if they did not belong to one of the groups.⁹² Because the district court ruled that SBA cannot presume social disadvantage

⁸⁶ 13 C.F.R. §124.504(a)-(c). The third provision applies only to preexisting procurement requirements. It generally does not apply to new contracts, follow-on or renewal contracts, or procurements conducted using simplified acquisition procedures. The SBA must presume an adverse impact when “(A) The small business concern has performed the specific requirement for at least 24 months; (B) The small business is performing the requirement at the time it is offered to the 8(a) ... program, or its performance of the requirement ended within 30 days of the procuring activity’s offer of the requirement to the 8(a) ... program; and (C) The dollar value of the requirement that the small business is or was performing is 25 percent or more of its most recent annual gross sales (including those of its affiliates).” See 13 C.F.R. §124.504(c)(1)(i)(A)-(C).

⁸⁷ 15 U.S.C. §637(a)(1)(A); 48 C.F.R. §19.806(b). Fair market price is estimated by looking at recent prices for similar items or work, in the case of repeat purchases, or by considering commercial prices for similar products or services, available in-house cost estimates, cost or pricing data submitted by the contractor, or data from other government agencies, in the case of new purchases. 15 U.S.C. §637(a)(3)(B)(i)-(iii); 48 C.F.R. §19.807(b) and (c).

⁸⁸ 15 U.S.C. §637(a)(1)(A).

⁸⁹ See *Rothe Computer Solutions, LLC*, B-299452 (May 9, 2007).

⁹⁰ For a summary of the outcome of this court ruling, see CRS Insight IN12245, *SBA’s 8(a) Business Development Program Responds to District Court Ruling*, by R. Corinne Blackford.

⁹¹ 13 C.F.R. §124.103(b).

⁹² 13 C.F.R. §124.103(c).

based on ethnic or racial group membership, the SBA stopped presuming social disadvantage. Any current program participant who had previously relied on the presumption of social disadvantage for program eligibility must now submit a narrative to SBA, and moving forward, per existing SBA regulations, an individual may prove social disadvantage by submitting “evidence to support his or her claim(s)” to the SBA.⁹³

Because of the program application changes that resulted from the ruling, Congress may be interested in program application processing issues, as well as whether agency contracting with SDBs has been affected by 8(a) program changes. Several thousand 8(a) firms were affected by the ruling, many of which were required to establish their socially disadvantaged status with the SBA through a personal narrative in order to remain in the 8(a) program after the ruling.⁹⁴

Performance Measurement and Program Reporting

Program performance measurement and required reporting may be of general interest to Congress, as the SBA addresses certain program monitoring and assessment challenges. The SBA's Office of Inspector General (OIG) identified concerns related to program performance measurement through a 2022 audit, and made recommendations that remain unresolved.⁹⁵ The OIG also identified the “management and monitoring” of the 8(a) Business Development Program as a top management and performance challenge for the agency in FY2023 and FY2024.⁹⁶

In addition, although detailed program reporting requirements exist, some reporting has been delayed by several years.⁹⁷ GAO recommended that the SBA “assess and address delays in annual

⁹³ 13 C.F.R. §124.103(c)(1). The applicant should demonstrate their claims “by a preponderance of the evidence.” This burden of proof is met if the applicant can show that there is a greater than 50% chance the applicant's claims are true. According to narrative writing issued by the SBA, the “key elements” of a narrative include (1) a description of a program participant's identity or characteristics and “how [they] have been subject to discrimination,” and (2) descriptions of two “incidents of bias” that demonstrate “chronic and substantial social disadvantage.” SBA notes that these incidents “should be related to education, employment, and business history.” SBA, “Guide for Writing a Social Disadvantage Narrative,” at <https://sbaone.atlassian.net/wiki/spaces/CKB/pages/2768076819/Guide+for+Demonstrating+Social+Disadvantage>.

⁹⁴ SBA, “Updates on the 8(a) Business Development Program,” at <https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program/updates-8a-business-development-program>; and U.S. General Services Administration System for Awards Management, at SAM.gov.

⁹⁵ SBA, OIG, *SBA Business Development Assistance to 8(a) Program Participants*, Report No. 22-08, February 14, 2022, at <https://www.sba.gov/document/report-22-08-sbas-business-development-assistance-8a-program-participants>. Specifically, the OIG recommended that SBA “Establish outcome-based performance goals and measurements to assess whether the program achieved business development objectives, including the number of graduated 8(a) firms” (p. 10). SBA agreed to implement the recommendation but disagreed with OIG's additional recommendation to use “outcome-based performance goals for regular data-driven reviews and align program leaders' personal performance plans with the goals” (p. 11). As of July 2024, all OIG recommendations from Report No. 22-08 remained open. See “SBA's Business Development Assistance to 8(a) Program Participants,” accessed July 8, 2024 at <https://www.oversight.gov/report/SBA/SBA%E2%80%99s-Business-Development-Assistance-8a-Program-Participants>.

⁹⁶ SBA, OIG, *Top Management and Performance Challenges Facing the Small Business Administration in Fiscal Year 2023*, Report No. 23-01, October 14, 2022, pp. 24-25; and SBA, OIG, *Top Management and Performance Challenges Facing the Small Business Administration in Fiscal Year 2024*, Report No. 24-01, October 16, 2023, pp. 35-37.

⁹⁷ Pursuant to the Business Opportunity Development Reform Act of 1988, the SBA is required to “develop and implement a process for the systematic collection of data on the operations of the [8(a)] Program” and to report this data, not later than April 30 of each year, to Congress. P.L. 100-656, the Business Opportunity Development Reform Act of 1988, §408. Data Collection, 102 Stat. 3877, 15 U.S.C. §636(j)(16)(A)(B)(C). The SBA has made these reports available on its website ([https://www.sba.gov/document/report-408-report-us-congress-minority-small-business-\(continued...\)](https://www.sba.gov/document/report-408-report-us-congress-minority-small-business-(continued...)))

reporting for the 8(a) Business Development program” in its May 2024 list of “Priority Open Recommendations” for the agency.⁹⁸

capital-ownership-development), though a gap exists between the reports for FY2018 and FY2023, the most recent report.

The act requires the report to include: The average and distribution of the personal net worth of individuals certified for program participation the preceding fiscal year; a description and estimate of the benefits and costs from 8(a) contractors that accrued to the economy and the government the preceding fiscal year; a compilation and evaluation of firms that exited the program during the past three fiscal years; a list of program participants during the preceding fiscal year, with various firm identifying information and data on contracts and payments received; data on the total dollar value of 8(a) contracts and options awarded during the preceding fiscal year; data on the total dollar value of 8(a) contracts and options categorized by contract industry; and a description of additional resources or authorities required to provide services needed over the next two-year period for the expected portfolio of 8(a) firms.

⁹⁸ U.S. Government Accountability Office, *Priority Open Recommendations: Small Business Administration*, GAO-24-107299, May 31, 2024, <https://www.gao.gov/products/gao-24-107299>.

Appendix A. Eligibility Requirements for 8(a) Firms

Program Eligibility

Program eligibility is limited to “small business[es] which [are] unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of and residing in the United States, and which demonstrates potential for success.”⁹⁹ Each of these terms is defined by the Small Business Act; SBA regulations; and judicial and administrative decisions.¹⁰⁰ The eligibility requirements are the same at the time of entry into the program and throughout the program unless otherwise noted.¹⁰¹

Business

Except for small agricultural cooperatives, a *business* is a for-profit entity that has a place of business located in the United States and operates primarily within the United States or makes a significant contribution to the U.S. economy by paying taxes or using American products, materials, or labor.¹⁰² For 8(a) Program purposes, businesses are individual proprietorships, partnerships, limited liability companies, corporations, joint ventures, associations, trusts, or cooperatives.¹⁰³

Small

A business is *small* if it is independently owned and operated; is not dominant in its field of operations; and meets any definitions or standards established by the SBA Administrator.¹⁰⁴ These standards focus primarily upon the size of the business as measured by the number of employees or average annual receipts (gross income for sole proprietorships), but they also take into account the size of other businesses within the same industry.¹⁰⁵ For example, businesses in the field of scheduled passenger air transportation are small if they have 1,500 or fewer employees, whereas those in the data processing field are small if they have average annual receipts of \$32.5 million or less.¹⁰⁶

Affiliations among businesses, or relationships allowing one party control over another, generally count in size determinations, with the SBA considering “the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates,

⁹⁹ 13 C.F.R. §124.101. The Office of Legal Counsel at the Department of Justice has opined that SBA regulations limiting eligibility for the 8(a) Program to citizens do not deprive resident aliens of due process in violation of the Fifth Amendment to the U.S. Constitution. See U.S. Department of Justice, Office of Legal Counsel, Constitutionality of 13 C.F.R. §124.103 Establishing Citizenship Requirement for Participation in 8(a) Program, 20 Op. O.L.C. 85 (1996).

¹⁰⁰ The SBA's Office of Hearings and Appeals has, for example, developed a seven-part test for determining whether a small business is *unusually reliant* on a contractor that is used in determining affiliation. See Valenzuela Eng'g, Inc. & Curry Contracting Co., Inc., SBA-4151 (1996).

¹⁰¹ 13 C.F.R. §124.112(a).

¹⁰² 13 C.F.R. §121.105(a)(1). “Business” is separately defined for small agricultural cooperatives. See 13 C.F.R. §121.105(a)(2).

¹⁰³ 13 C.F.R. §121.105(b).

¹⁰⁴ 15 U.S.C. §632(a)(1)-(2)(A).

¹⁰⁵ 13 C.F.R. §§121.101-121.109. The number of employees is the average number in each pay period for the preceding 12 calendar months. Receipts means *total income* (or in the case of a sole proprietorship, *gross income*) plus *cost of goods sold* as these terms are defined and reported on Internal Revenue Service tax return forms. Where possible, receipts are based on the average for the last three completed fiscal years. It includes all revenues, not just those from the firm's primary industry. See 13 C.F.R. §121.104.

¹⁰⁶ 13 C.F.R. §121.201.

regardless of whether the affiliates are organized for profit.”¹⁰⁷ Businesses can thus be determined to be other than small because of their involvement in joint ventures, subcontracting arrangements, or franchise or license agreements, among other things, provided that their income or personnel numbers, plus those of their affiliate(s), are over the pertinent size threshold.¹⁰⁸

Unconditionally Owned and Controlled

8(a) firms must be “at least 51% unconditionally and directly **owned** by one or more socially and economically disadvantaged individuals who are citizens of the United States” unless they are owned by an ANC, CDC, NHO, or Indian tribe.¹⁰⁹ Ownership is *unconditional* when it is not subject to any conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements that could cause the benefits of ownership to go to another entity.¹¹⁰ Ownership is *direct* when the disadvantaged individuals own the business in their own right and not through an intermediary (e.g., ownership by another business entity or by a trust that is owned and controlled by one or more disadvantaged individuals).¹¹¹ Nondisadvantaged individuals and nonparticipant businesses that own at least 10% of an 8(a) business may generally own no more than 10% to 20% of any other 8(a) firm. Ownership is limited to 10% when the 8(a) firm is in the *developmental stage* of the 8(a) Program and 20% when it is in the *transitional stage*.¹¹² Nonparticipant businesses that earn the majority of their revenue in the same or similar line of business are likewise barred from owning more than 10% (increasing to 20%-30% in certain circumstances) of another 8(a) firm.¹¹³

In addition, 8(a) firms must be **controlled** by one or more disadvantaged individuals.¹¹⁴ “Control is not the same as ownership,” and includes both strategic policy setting and day-to-day management and administration of business operations.¹¹⁵ Management and daily business operations must be conducted by one or more disadvantaged individuals unless the 8(a) business is owned by an ANC, CDC, NHO, or Indian tribe.¹¹⁶ These individuals must have managerial experience “of the extent and complexity needed to run the concern,” and generally must devote themselves full-time to the business “during the normal working hours of firms in the same or similar line of business.”¹¹⁷ A disadvantaged individual must hold the highest officer position within the business.¹¹⁸ Nondisadvantaged individuals may otherwise be involved in the management of an 8(a) business, or may be stockholders, partners, limited liability members, officers, or directors of an 8(a) business.¹¹⁹ However, nondisadvantaged individuals may not exercise actual control or have the power to control the firm or its disadvantaged owner(s), or

¹⁰⁷ 13 C.F.R. §121.103(a)(6).

¹⁰⁸ 13 C.F.R. §121.103(h); 13 C.F.R. §121.103(h)(4); and 13 C.F.R. §121.103(i).

¹⁰⁹ 13 C.F.R. §124.105 (defining unconditional ownership). See also 15 U.S.C. §637(a)(4)(A)(i)-(ii) (requiring at least 51% unconditional ownership).

¹¹⁰ 13 C.F.R. §124.3.

¹¹¹ 13 C.F.R. §124.105(a).

¹¹² 13 C.F.R. §124.105(h)(1).

¹¹³ 13 C.F.R. §124.105(h)(2).

¹¹⁴ 15 U.S.C. §637(a)(4)(A)(i)-(ii) (requiring control of management and business operations); 13 C.F.R. §124.106.

¹¹⁵ 13 C.F.R. §124.106.

¹¹⁶ 13 C.F.R. §124.106.

¹¹⁷ 13 C.F.R. §124.106 and §124.106(a)(3).

¹¹⁸ 13 C.F.R. §124.106(a)(2). The individual must also be physically located in the United States.

¹¹⁹ 13 C.F.R. §124.106(e).

receive compensation greater than that of the highest-paid officer (usually the chief executive officer or president) without the SBA's approval.¹²⁰

Socially Disadvantaged Individual

Socially disadvantaged individuals are “those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities.”¹²¹

To establish “social disadvantage,” individuals must show (1) at least one objective distinguishing feature that has contributed to social disadvantage (e.g., race, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from mainstream American society); (2) personal experiences of substantial and chronic social disadvantage in American society; and (3) negative impact on entry into or advancement in the business world.¹²² In assessing the third factor, the SBA will consider all relevant evidence the applicant produces, but must consider the applicant's education, employment, and business history to see if the totality of the circumstances shows disadvantage.¹²³

Economically Disadvantaged Individual

Economically disadvantaged individuals are “socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.”¹²⁴

To establish “economic disadvantage,” individuals claiming economic disadvantage must submit financial documentation for eligibility purposes.¹²⁵ The SBA examines the individual's personal income for the past three years, their net worth, and the fair market value of their assets.¹²⁶ To be economically disadvantaged, an individual must have a net worth of less than \$850,000 (excluding ownership interest in the applicant's business, equity in their primary personal residence, and funds invested in an official retirement account), no more than \$400,000 in average adjusted gross income over the preceding three years, and no more than \$6.5 million in assets (excluding funds invested in an official retirement account but including the applicant's primary residence and the value of the applicant's firm).¹²⁷

Good Character

In determining whether an applicant to, or participant in, the 8(a) Program possesses *good character*, the SBA considers any criminal conduct, violations of SBA regulations, current debarment or suspension from government contracting, managers or key employees who lack business integrity, and the knowing submission of false information to the SBA.¹²⁸

¹²⁰ 13 C.F.R. §124.106(e)(1) and (3).

¹²¹ 13 C.F.R. §124.103(a). See also 15 U.S.C. §637(a)(5).

¹²² 13 C.F.R. §124.103(c)(2)(i)-(iii).

¹²³ 13 C.F.R. §124.103(c)(2)(iii).

¹²⁴ 13 C.F.R. §124.104(a). See also 15 U.S.C. §637(a)(6)(A).

¹²⁵ 13 C.F.R. §124.104(b)(1).

¹²⁶ 13 C.F.R. §124.104(c). See also 15 U.S.C. §637(a)(6)(E)(i)-(ii).

¹²⁷ 13 C.F.R. §124.104(c)(2)-(4).

¹²⁸ 13 C.F.R. §124.108(a)(1)-(5).

Demonstrated Potential for Success

For a firm to have demonstrated potential for success, it generally must have been in business in its primary industry classification for at least two full years immediately prior to the date of its application to the 8(a) Program.¹²⁹ However, the SBA may grant a waiver allowing firms that have been in business for less than two years to enter the program under specified circumstances.¹³⁰

Eligibility for Tribally, ANC-, NHO-, and CDC-Owned Firms

Tribes, Alaska Native Corporations (ANCs), Native Hawaiian Organizations (NHOs), or Community Development Corporations (CDCs) themselves generally do not participate in the 8(a) Program. Rather, businesses that are at least 51% owned by such entities participate in the program,¹³¹ although the rules governing their participation are somewhat different from those for the program generally.¹³²

Small

Firms owned by Indian tribes, ANCs, NHOs, and CDCs must be deemed small under the SBA's size standards.¹³³ However, certain affiliations with the owning entity or other business enterprises of that entity are excluded in size determinations *unless* the SBA Administrator determines that a small business owned by an ANC, CDC, NHO, or Indian tribe “[has] obtained, or [is] likely to obtain, a substantial unfair competitive advantage within an industry category” because of such exclusions.¹³⁴ Other affiliations of small businesses owned by ANCs, CDCs, NHOs, and Indian tribes may be included in size determinations, and ANC-owned firms, in particular, have been subjected to early graduation from the 8(a) Program because they exceeded size standards.¹³⁵

¹²⁹ 13 C.F.R. §124.107.

¹³⁰ A waiver to the two-year requirement may be granted when (1) the disadvantaged individual(s) upon whom eligibility is based have substantial business management experience; (2) the business has demonstrated the technical experience necessary to carry out its business plan with a substantial likelihood of success; (3) the firm has adequate capital to sustain its operations and carry out its business plan; (4) the firm has a record of successful performance on contracts in its primary field of operations; and (5) the firm presently has, or can demonstrate its ability to timely obtain, the personnel, facilities, equipment, and other resources necessary to perform 8(a) contracts. See 13 C.F.R. §124.107(b)(1)(i)-(v).

¹³¹ 13 C.F.R. §124.109(c)(3)(i) (tribally and ANC-owned firms); 13 C.F.R. §124.110 (b) (NHO-owned firms); and 13 C.F.R. §124.111(c) (CDC-owned firms).

¹³² 13 C.F.R. §§124.109-124.111.

¹³³ 13 C.F.R. §124.109(c)(2) (tribally and ANC-owned firms); 13 C.F.R. §124.110(b) (NHO-owned firms); and 13 C.F.R. §124.111(c) (CDC-owned firms).

¹³⁴ 13 C.F.R. §124.109(c)(2)(iii) (tribally and ANC-owned firms); 13 C.F.R. §124.110(b) (NHO-owned firms); and 13 C.F.R. §124.111(c) (CDC-owned firms).

¹³⁵ See Valenzuela Eng'g, Inc. & Curry Contracting Co., Inc., SBA-4151 (1996) (rejecting a challenge to the size of an ANC-owned firm because its subcontractor performed less than 25% of the work on the contract and was not its affiliate); and U.S. Government Accountability Office (GAO), *Increased Used of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight*, GAO-06-399, April 27, 2006, p. 29, at <http://www.gao.gov/new.items/d06399.pdf> (describing “early graduation” of ANC-owned 8(a) firms).

Business

Firms owned by ANCs, CDCs, NHOs, and Indian tribes must be “businesses” under the SBA’s definition.¹³⁶ Although ANCs themselves may be for-profit or nonprofit, ANC-owned businesses must be for-profit to participate in the program.¹³⁷

Unconditionally Owned and Controlled

Firms owned by ANCs, CDCs, NHOs, or Indian tribes must be unconditionally owned and substantially controlled by the ANC, CDC, NHO, or Indian tribe, respectively.¹³⁸ However, under SBA regulations, tribally or ANC-owned firms may be managed by individuals who are not members of the tribe or Alaska Natives if the firm can demonstrate:

- that the tribe (or ANC) can hire and fire those individuals,
- that it will retain control of all management decisions common to boards of directors, including strategic planning, budget approval, and the employment and compensation of officers, and
- that a written management development plan exists which shows how tribal members will develop managerial skills sufficient to manage the concern or similar tribally-owned concerns in the future.¹³⁹

NHO-owned firms must demonstrate that the NHO controls the board of directors.¹⁴⁰ However, the individual who is responsible for the NHO-owned firm’s day-to-day management need not establish personal social and economic disadvantage.¹⁴¹ CDCs are to be managed and have their daily operations conducted by individuals with “managerial experience of an extent and complexity needed to run the [firm].”¹⁴²

Socially Disadvantaged

Indian tribes, ANCs, NHOs, and CDCs are all presumed to be socially disadvantaged.¹⁴³ “The updated application process [resulting from the 2023 district court decision] does not apply to entity-owned firms, such as firms owned by Indian tribes, Alaska Native Corporations, Native

¹³⁶ 13 C.F.R. §124.109(a) and (b) (requiring tribally and ANC-owned firms to comply with the general eligibility requirements where they are not contrary to or inconsistent with the special requirements for these entities); 13 C.F.R. §124.110(a) (similar provision for NHO-owned firms); and 13 C.F.R. §124.111(a) (similar provision for CDC-owned firms).

¹³⁷ 13 C.F.R. §124.109(a)(3).

¹³⁸ 13 C.F.R. §124.109(a) and (b) (requiring tribally and ANC-owned firms to comply with the general eligibility requirements where they are not contrary to or inconsistent with the special requirements for these entities); 13 C.F.R. §124.110(a) (similar provision for NHO-owned firms); and 13 C.F.R. §124.111(a) (similar provision for CDC-owned firms).

¹³⁹ 13 C.F.R. §124.109(c)(4)(B).

¹⁴⁰ 13 C.F.R. §124.110(d).

¹⁴¹ 13 C.F.R. §124.110(d).

¹⁴² 13 C.F.R. §124.111(b).

¹⁴³ 13 C.F.R. §124.109(b)(1) (tribally and ANC-owned firms); 15 U.S.C. §637(a)(4)(A)(i)(II) (NHO-owned firms); 13 C.F.R. §124.110(a) (same); 13 C.F.R. §124.111(a) (CDC-owned firms); and Small Disadvantaged Business Certification Application: Community Development Corporation (CDC) Owned Concern, OMB Approval No. 3245-0317 (“A Community Development Corporation (CDC) is considered to be a socially and economically disadvantaged entity if the parent CDC is a nonprofit organization responsible to residents of the area it serves which has received financial assistance under 42 U.S.C. 9805, et seq.”). The SBA’s authority to designate CDCs as socially and economically disadvantaged derives from Section 9815(a)(2) of Title 42 of the *United States Code*, which required SBA to “promulgate regulations to ensure the availability to community development corporations of such programs as shall further the purposes of this subchapter, including programs under §637(a) of title 15.”

Hawaiian Organizations or Community Development Corporations” and those firms are not required to submit narratives showing their social disadvantage to the SBA.¹⁴⁴

Economically Disadvantaged

By statute, ANCs are deemed to be economically disadvantaged, and CDCs are similarly treated as economically disadvantaged.¹⁴⁵ In contrast, Indian tribes and NHOs must establish economic disadvantage. Indian tribes must present data on, among other things, the number of tribe members; the tribe members’ unemployment rate and per capita income; the percentage of the local Indian population above the poverty level; the tribe’s access to capital and assets as disclosed in current financial statements; and all businesses wholly or partially owned by tribal enterprises or affiliates, as well as their primary industry classification.¹⁴⁶ Effective August 24, 2016, NHOs establish economic disadvantage in the same manner as Indian tribes.¹⁴⁷ Prior to this revision, the SBA considered “the individual economic status of NHO’s members,” the majority of whom had to qualify as economically disadvantaged, under the same standards as individual applicants to the program.¹⁴⁸

Once a tribe or NHO has established that it is economically disadvantaged for purposes of one 8(a) business, it need not reestablish economic disadvantage in order to have other businesses certified for the program *unless* the Director of the Office of Business Development requires it to do so.¹⁴⁹

Good Character

The SBA’s regulations governing tribally and ANC-owned 8(a) firms explicitly state that the good character requirement applies only to officers or directors of the firm, or shareholders owning more than a 20% interest.¹⁵⁰ NHO-owned firms may be subject to the same requirements in practice.¹⁵¹ With CDC-owned firms, the firm itself and “all of its principals” must have good character.¹⁵²

¹⁴⁴ SBA, “Updates on the 8(a) Business Development program,” at <https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program/updates-8a-business-development-program#id-guidance-for-potential-a-applicants-interested-in-applying-t>.

¹⁴⁵ 43 U.S.C. §1626(e)(1) (“For all purposes of Federal law, a Native Corporation shall be considered to be a corporation owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the Settlement Common Stock of the corporation and other stock of the corporation held by holders of Settlement Common Stock and by Natives and descendants of Natives, represents a majority of both the total equity of the corporation and the total voting power of the corporation for the purposes of electing directors.”); 13 C.F.R. §124.109(a)(2) (similar); and 13 C.F.R. §124.111(a).

¹⁴⁶ 15 U.S.C. §637(a)(6)(A); and 13 C.F.R. §124.109(b)(2)(i)-(vii).

¹⁴⁷ SBA, “Small Business Mentor Protégé Program,” 81 *Federal Register* 48571, July 25, 2016.

¹⁴⁸ 13 C.F.R. §124.110(c)(1). Specifically, for the first 8(a) applicant owned by a particular NHO, individual NHO members had to meet the same initial eligibility economic disadvantage thresholds as individually-owned 8(a) applicants. For any additional 8(a) applicant owned by the NHO, individual NHO members had to meet the economic disadvantage thresholds for continued 8(a) eligibility. If the NHO had no members, then a majority of the members of the board of directors had to qualify as economically disadvantaged.

¹⁴⁹ 13 C.F.R. §124.109(b).

¹⁵⁰ 13 C.F.R. §124.109(c)(7)(ii).

¹⁵¹ The regulations as to NHOs do not appear to address “good character.” However, in practice, when this has happened in the past, NHO-owned firms have often been treated the same as firms owned by Indian tribes.

¹⁵² 13 C.F.R. §124.111(g).

Demonstrated Potential for Success

Firms owned by ANCs, CDCs, NHOs, and Indian tribes may provide evidence of *potential for success* in several ways:

1. The firm has been in business for at least two years, as shown by individual or consolidated income tax returns for each of the two previous tax years showing operating revenues in the primary industry in which the firm seeks certification.
2. The individuals who will manage and control the firm's daily operations have substantial technical and management experience; the firm has a record of successful performance on government or other contracts in its primary industry category; and the firm has adequate capital to sustain its operations and carry out its business plan.
3. The owner-group has made a firm written commitment to support the firm's operations and has the financial ability to do so.¹⁵³

The first of these ways for demonstrating potential for success is the same for individually owned firms, and the second arguably corresponds to the circumstances in which the SBA may waive the requirement that individually owned firms have been in business for at least two years.¹⁵⁴ There is no equivalent to the third way for individually owned firms, and some commentators have suggested that this provision may be a benefit for group-owned applicants.¹⁵⁵

¹⁵³ 13 C.F.R. §124.109(c)(6)(i)-(iii) (ANC- and tribally-owned firms); 13 C.F.R. §124.110(g)(1)-(3) (NHO-owned firms); and 13 C.F.R. §124.111(f)(1)-(3) (CDC-owned firms).

¹⁵⁴ 13 C.F.R. §124.107; and 13 C.F.R. §124.107(b)(1)(i)-(v).

¹⁵⁵ Daniel K. Oakes, "Inching Toward Balance: Reaching Proper Reform of the Alaska Native Corporations' 8(a) Contracting Preferences," 40 *Public Contract Law Journal* 777 (2011).

Appendix B. Participant Reporting Requirements

8(a) firms must demonstrate program compliance by reporting specific information to the SBA on an as needed, periodic, or requested basis. Much of the reporting is accomplished through the required annual review, which focuses on the firm's business development.¹⁵⁶

Annual Review Reporting

To remain eligible for 8(a) program participation, every program participant must submit a variety of information to the SBA annually, including the following:

- Personal financial information for each disadvantaged owner;
- A certification that there have been no changed circumstances which could adversely affect the Participant's program eligibility (or notice to SBA of any changes with relevant supporting documentation);
- Records regarding the transfer of assets to any immediate family member, or to a trust any beneficiary of which is an immediate family member, within two years of the date of the annual review;
- A record of all payments, compensation, and distributions (including loans, advances, salaries and dividends) made by the firm to each of its owners, officers or directors, or to any person or entity affiliated with such individuals; and
- A list of fees paid to agents or representatives for assistance with obtaining or seeking to obtain a federal contract.¹⁵⁷

If the firm participates in the Mentor-Protégé Program, it must provide "a narrative report detailing the contracts it has had with its mentor and benefits it has received from the mentor/protégé relationship."¹⁵⁸ In addition, the firm must provide a report for each 8(a) contract performed during the year "explaining how the performance of work requirements are being met for the contract, including any 8(a) contracts performed as a joint venture."¹⁵⁹

Community Benefits Reporting

Group-owned firms must report the community benefits of program participation for tribes, ANCs, NHOs, and CDCs. SBA regulations state:

As part of its annual financial statement submission (see § 124.602), each Participant owned by a Tribe, ANC, NHO or CDC must submit to SBA information showing how the Tribe, ANC, NHO or CDC has provided benefits to the Tribal or native members and/or the Tribal, native or other community due to the Tribe's/ANC's/NHO's/CDC's participation in the 8(a) BD program through one or more firms. This data includes information relating to funding cultural programs, employment assistance, jobs,

¹⁵⁶ 13 C.F.R. §124.403. Program participant annual reviews are distinct from "eligibility reviews," which are conducted by the SBA "Upon receipt of specific and credible information alleging that a Participant no longer meets the eligibility requirements for continued program eligibility." 13 C.F.R. §124.112(c)(1).

¹⁵⁷ 13 C.F.R. §124.112(b).

¹⁵⁸ 13 C.F.R. §124.112(b)(6).

¹⁵⁹ 13 C.F.R. §124.112(b)(8).

scholarships, internships, subsistence activities, and other services provided by the Tribe, ANC, NHO or CDC to the affected community.¹⁶⁰

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¹⁶⁰ 13 C.F.R. §124.604.