Congressional Research Service

The "8(a) Program" for Small Businesses Owned and Controlled by the Socially and Economically Disadvantaged: Legal Requirements and Issues

John R. Luckey
Legislative Attorney

Kate M. Manuel
Legislative Attorney

March 18, 2010

Congressional Research Service

7-5700

www.crs.gov

R40744

CRS Report for Congress

Prepared for Members and Committees of Congress

c11173008

Summary

This report provides an overview of the Small Business Administration's (SBA's) Minority Small Business and Capital Ownership Development Program. Based upon authorities given to the SBA by Sections 7(j) and 8(a) of the Small Business Act of 1958, as amended, this program is commonly known as the "8(a) Program." The 8(a) Program provides participating small businesses with training, technical assistance, and contracting opportunities in the form of set-asides and sole-source awards. A "set-aside" is an acquisition in which only certain contractors may compete, while a sole-source award is a contract awarded, or proposed for award, without competition. Eligibility for the 8(a) Program is generally limited to small businesses "unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of the United States" that demonstrate "potential for success." However, small businesses owned by Indian tribes, Alaska Native Corporations (ANCs), Native Hawaiian Organizations (NHOs), and Community Development Corporations (CDCs) are eligible for the 8(a) Program under somewhat different terms. In FY2008, 9,462 firms participated in the 8(a) Program, and the federal government spent $6.3 billion on contracts with 8(a) firms.

The report surveys the historical development of the 8(a) Program, as well as the legal requirements presently governing (1) eligibility for the 8(a) Program, (2) set-asides and sole-source awards under Section 8(a), and (3) related matters. It also discusses potential developments in the 8(a) Program in light of recently proposed legislation, changes in executive branch policies, and legal challenges and decisions. It includes the changes that SBA proposed to the regulations governing the 8(a) Program on October 28, 2009.

The 111th Congress is considering several bills that would modify various aspects of the 8(a) Program or otherwise promote contracting with 8(a) firms (e.g., H.R. 456, H.R. 2200, H.R. 2299, H.R. 2682, H.R. 3326, H.R. 3771, H.R. 4220, H.R. 4253, H.R. 4818, S. 1167, S. 2862).

Contents

Figures

Tables

Appendixes

Contacts

Introduction

This report provides an overview of the Small Business Administration's (SBA's) Minority Small Business and Capital Ownership Development Program. Based upon authorities given to the SBA by Sections 7(j) and 8(a) of the Small Business Act of 1958, as amended, this program is commonly known as the "8(a) Program." The 8(a) Program provides participating small businesses with training, technical assistance, and contracting opportunities in the form of set-asides and sole-source awards. A "set-aside" is an acquisition in which only certain contractors may compete, while a sole-source award is a contract awarded, or proposed for award, without competition. Eligibility for the 8(a) Program is generally limited to small businesses "unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of the United States" that demonstrate "potential for success." However, small businesses owned by Indian tribes, Alaska Native Corporations (ANCs), Native Hawaiian Organizations (NHOs), and Community Development Corporations (CDCs) are eligible for the 8(a) Program under somewhat different terms. In FY2008, 9,462 firms participated in the 8(a) Program, and the federal government spent $6.3 billion on contracts with 8(a) firms.[1]

The report surveys the historical development of the 8(a) Program, as well as the legal requirements presently governing (1) eligibility for the 8(a) Program, (2) set-asides and sole-source awards under Section 8(a), and (3) related matters. It also discusses potential developments in the 8(a) Program in light of recently proposed legislation, changes in executive branch policies, and legal challenges and decisions. It includes the changes that SBA proposed to the regulations governing the 8(a) Program on October 28, 2009.

The 111th Congress is considering several bills that would modify various aspects of the 8(a) Program or otherwise promote contracting with 8(a) firms (e.g., H.R. 456, H.R. 2200, H.R. 2299, H.R. 2682, H.R. 3326, H.R. 3771, H.R. 4220, H.R. 4253, H.R. 4818, S. 1167, S. 2862).

History of the 8(a) Program

Origins of the 8(a) Program

The current 8(a) Program resulted from the merger of two distinct types of federal programs: those seeking to assist small businesses in general and those seeking to assist racial and ethnic minorities. This merger first occurred, as a matter of executive branch practice, in 1967 and was given a statutory basis in 1978.

[1] Small Bus. Admin., Office of Business Development, FY2008 Annual Report to Congress, *available at* http://www.sba.gov/idc/groups/public/documents/sba_program_office/8abd_408_fy2008report.pdf.

Federal Programs for Small Businesses: The Origins of the SBA's Subcontracting Authority

Congress first authorized a federal agency to enter into prime contracts with other agencies and subcontract with small businesses for the performance of these contracts in 1942.[2] The agency was the Smaller War Plants Corporation (SWPC), which was created partly for this purpose, and Congress gave it these powers in order to ameliorate small businesses' financial difficulties while also "mobiliz[ing] the productive facilities of small business in the interest of successful prosecution of the war."[3] The SWPC's subcontracting authority expired along with the SWPC at the end of the World War II, but Congress created the Small Defense Plants Administration (SDPA), which was generally given the same powers that the SWPC had exercised, in 1951 at the start of the Korean War.[4] Two years later, in 1953, Congress transferred the SDPA's subcontracting authority, among others, to the newly created Small Business Administration,[5] with the intent that the SBA would exercise these powers in peacetime, as well as in wartime.[6] When the Small Business Act of 1958 transformed the SBA into a permanent independent agency, this subcontracting authority was included in Section 8(a) of the act.[7] At its inception, the SBA's subcontracting authority was not limited to small businesses owned and controlled by the socially and economically disadvantaged. Under the original Section 8(a), the SBA could contract with any "small-business concerns or others,"[8] but the SBA seldom, if ever, employed this subcontracting authority, focusing instead upon its loan programs and other programs.[9]

Federal Programs for Minorities Merge with the SBA's Subcontracting Authority: Executive Branch Policy and Administrative Regulations

Federal programs for minorities began developing at approximately the same time as those for small businesses, although there was initially no explicit overlap between them. The earliest programs were created by executive orders, beginning with President Franklin Roosevelt's order on June 25, 1941, requiring that all federal agencies include a clause in defense-related contracts prohibiting contractors from discriminating on the basis of race, creed, color, or national origin.[10]

---

[2] Small Business Mobilization Act, P.L. 77-603, § 4(f), 56 Stat. 351 (June 11, 1942).

[3] *Id.*

[4] Act of July 31, 1951, P.L. 82-96, § 110, 65 Stat. 131.

[5] P.L. 83-163, § 207(c)-(d), 67 Stat. 230 (July 30, 1953).

[6] *See, e.g.,* H.Rept. 494, 83d Cong., 1st Sess., at 2 (1953) (stating that the SBA would "continue many of the functions of the [SDPA] in the present mobilization period and in addition would be given powers and duties to encourage and assist small-business enterprises in peacetime as well as in any future war or mobilization period"); S. Rep. No. 1714, 85th Cong., 2d Sess., at 9-10 (1958) (stating that the act would "put[] the procurement assistance program on a peacetime basis").

[7] P.L. 85-536, § 8(a)(1)-(2), 72 Stat. 384 (July 18, 1958).

[8] *Id.*

[9] Thomas Jefferson Hasty, III, Minority Business Enterprise Development and the Small Business Administration's 8(a) Program: Past, Present, and (Is There a) Future? 145 *Mil. L. Rev.* 1, 8 (1994) ("[B]ecause the SBA believed that the efforts to start and operate an 8(a) program would not be worthwhile in terms of developing small business, the SBA's power to contract with other government agencies essentially went unused. The program actually lay dormant for about fifteen years until the racial atmosphere of the 1960s provided the impetus to wrestle the SBA's 8(a) authority from its dormant state.").

[10] Exec. Order No. 8802, 6 Fed. Reg. 3,109 (June 25, 1941). Similar requirements were later imposed on non-defense contracts. *See* Exec. Order No. 9346, 8 Fed. Reg. 7,182 (May 29, 1943).

Subsequent Presidents followed Roosevelt's example, issuing a number of executive orders seeking to improve the employment opportunities of "Negroes, Spanish-Americans, Orientals, Indians, Jews, Puerto Ricans, etc."[11] These executive branch initiatives took on new importance after the Kerner Commission's report on the causes of the urban riots of 1966 concluded that African Americans would need "special encouragement" to enter the economic mainstream.[12]

Presidents Lyndon Johnson and Richard Nixon laid the foundations for the present 8(a) Program in the hope of providing such "encouragement." Johnson created the President's Test Cities Program (PTCP), which involved a small-scale use of the SBA's authority under Section 8(a) to award contracts to firms willing to locate in urban areas and hire unemployed individuals, largely African Americans, or sponsor minority-owned businesses by providing capital or management assistance.[13] Under the PTCP, small businesses did not have to be minority-owned to receive subcontracts under Section 8(a), though.[14] Nixon's program was larger and focused more specifically on minority-owned small businesses.[15] Under Nixon, the SBA promulgated its earliest regulations for the 8(a) Program. In 1970, the first of these regulations articulated the SBA's policy of using Section 8(a) to "assist small concerns owned by disadvantaged persons to become self-sufficient, viable businesses capable of competing effectively in the market place."[16] A later regulation, promulgated in 1973, defined "disadvantaged persons" as including, but not limited to, "black Americans, Spanish-Americans, oriental Americans, Eskimos, and Aleuts."[17] However, the SBA lacked explicit statutory authority for focusing its 8(a) Program on minority-owned businesses.[18]

The 1978 Amendments to the Small Business Act and Subsequent Regulatory Developments

In 1978, Congress amended the Small Business Act of 1958 to give the SBA statutory authority for its 8(a) Program for minority-owned businesses.[19] Under the 1978 amendments, SBA can only subcontract under Section 8(a) with "socially and economically disadvantaged small business concerns,"[20] or businesses which are least 51% owned by one or more socially and economically

[11] *See, e.g.*, Exec. Order No. 10308, 16 Fed. Reg. 12,303 (Dec. 3, 1951) (Truman); Exec. Order No. 10557, 19 Fed. Reg. 5,655 (Sept. 3, 1954) (Eisenhower); Exec. Order No. 10925, 26 Fed. Reg. 1,977 (Mar. 6, 1961) (Kennedy); Exec. Order No. 11458, 34 Fed. Reg. 4,937 (Mar. 7, 1969) (Nixon).

[12] *Report of the National Advisory Commission on Civil Disorders* 21 (1968).

[13] *See, e.g.*, Hasty, *supra* note 9, at 11-12.

[14] *See, e.g.*, Jonathan J. Bean, *Big Government and Affirmative Action: The Scandalous History of the Small Business Administration* 66 (2001).

[15] *See* Exec. Order No. 1625, 36 Fed. Reg. 19,967 (Oct. 13, 1971).

[16] 13 C.F.R. § 124.8-1(b) (1970).

[17] 13 C.F.R. § 124.8(c) (1973).

[18] S. Rep. No. 95-1070, 95th Cong., 2d Sess., at 14 (1978) ("One of the underlying reasons for the failure of this effort is that the program has no legislative basis."); H.Rept. 95-949, 95th Cong., 2d Sess., at 4 (1978) ("Congress has never extended legislative control over the activities of the 8(a) program, save through indirect appropriations, thereby permitting program operations. … [The] program is not as successful as it could be.").

[19] P.L. 95-507, 92 Stat. 1757 (Oct. 24, 1978).

[20] *Id.* at § 202.

disadvantaged individuals and whose management and daily operations are controlled by such individual(s).[21]

The 1978 amendments established a basic definition of "socially disadvantaged individuals," which included those who have been "subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities."[22] They also included congressional findings that "Black Americans, Hispanic Americans, Native Americans, and other minorities" are socially disadvantaged.[23] Thus, if an individual was a member of one of these groups, he or she was presumed to be socially disadvantaged. Otherwise, the amendments granted the SBA broad discretion to recognize additional groups or individuals as socially disadvantaged based upon criteria promulgated in regulations.[24] Under these regulations, which include a three-part test for determining whether minority groups not mentioned in the amendment's findings are disadvantaged,[25] the SBA recognized the racial or ethnic groups listed in **Table 1** as socially disadvantaged for purposes of the 8(a) Program.[26] The

---

[21] *Id.* (codified at 15 U.S.C. § 637(a)(4)(A)-(B)). Firms that are owned and controlled by Indian tribes, ANCs, or NHOs were later included within the definition of a "socially and economically disadvantaged small business concern." *See infra* notes 29 to 36 and accompanying text.

[22] *Id.* (codified at 15 U.S.C. § 637(a)(5)).

[23] *Id.* at § 201 (codified at 15 U.S.C. § 631(f)(1)(C)). The meaning of "socially disadvantaged individuals" was the subject of much debate at the time of the 1978 amendments. Some Members of Congress, perhaps focusing on the SBA's use of its authority under Section 8(a) in 1968-1970, viewed the 8(a) Program as a program for African Americans and would have defined "social disadvantage" accordingly. *See, e.g.*, Parren J. Mitchell, Federal Affirmative Action for MBE's: An Historical Analysis, 1 *Nat'l Bar Ass'n Mag.* 46 (1983). Mitchell was a Member of the U.S. House of Representatives and leader of the Black Caucus when the 1978 amendments were enacted. Others favored a somewhat broader view, including both African Americans and Native Americans on the grounds that only those who did not come to the United States seeking the "American dream" should be deemed socially disadvantaged. *See, e.g.*, Testimony Before the House Comm. on Small Bus., Subcomm. on General Oversight & Minority Enter., Task Force on Minority Enter., 96th Cong., at 21 (1979). Yet others suggested that groups that are not racial or ethnic minorities should be able to qualify as "socially disadvantaged," or that individuals ought to be able to prove they are personally socially disadvantaged even if they are not racial or ethnic minorities. *See, e.g.*, H.Rept. 95-949, 95th Cong., 2d Sess., at 9 (1978) ("[T]he committee intends that the SBA give most serious consideration to, among others, women business owners" when determining which groups are socially disadvantaged. ... [T]he bill does recognize that persons falling outside of the racial and ethnic groups presumed to be disadvantaged, may nevertheless be disadvantaged."). Ultimately, the bill that passed the House defined "socially disadvantaged individuals," in part, by establishing a rebuttable presumption that African Americans and Hispanic Americans are socially disadvantaged, while the bill that passed the Senate did not reference any racial or ethnic groups in defining "social disadvantage." *See, e.g.*, H.R. Conf. Rep. No. 95-1714, 95th Cong., 2d Sess., at 20 (1978); S.Rept. 95-1070, 95th Cong., 2d Sess., at 13-16 (1978). The conference committee reconciling the House and Senate versions ultimately arrived at a definition of "socially disadvantaged individuals" that was broader than the definition used in the SBA's 1973 regulation and included "those who have been subjected to racial or ethic prejudice or cultural bias because of their identity as a member of a group." P.L. 95-507, at § 202. This definition did not incorporate the rebuttable presumption that members of certain groups are socially disadvantaged included in the House bill. However, the conference bill included congressional findings that "Black Americans, Hispanic Americans, Native Americans, and other minorities" are socially disadvantaged, thereby arguably achieving similar effect. *Id*. at § 201.

[24] P.L. 95-507, at § 202 (granting the SBA's Associate Administrator for Minority Small Business and Capital Ownership Development authority to make determinations regarding which other groups are socially disadvantaged); H.Rept. 95-949, *supra* note 23, at 9 (expressing the view that Sections 201 and 202 of the bill provide "sufficient discretion … to allow SBA to designate any other additional minority group or persons it believes should be afforded the presumption of social … disadvantage").

[25] *See* 13 C.F.R. § 124.103(d)(2)(i)-(iii)(1980).

[26] 13 C.F.R. § 124.103(b)(2009). Different groups are sometimes recognized as socially disadvantaged for purposes of other programs, such as those of the Department of Commerce's Minority Business Development Agency (MBDA). *See* 15 C.F.R. § 1400.1(a). The SBA has rejected petitions from certain groups, including Hasidic Jews, women, disabled veterans, and Iranian-Americans. *See, e.g.*, George R. La Noue & John C. Sullivan, Gross Presumptions: (continued...)

regulations also established standards of evidence to be met by individuals demonstrating personal disadvantage and procedures for rebutting the presumption of social disadvantage accorded to members of recognized minority groups.[27]

Table 1. Groups Presumed to Be Socially Disadvantaged

Group	Countries of Origin Included Within Group
Black Americans	n/a
Hispanic Americans	n/a
Native Americans (including American Indians, Eskimos, Aleuts, Native Hawaiians)	n/a
Asian Pacific Americans	Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia, Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru
Subcontinent Asian Americans	India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands, Nepal

Source: Congressional Research Service, based on 13 C.F.R. § 124.103(b) (2009).

The 1978 amendments also defined "economically disadvantaged individuals," for purposes of the 8(a) Program, as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired … as compared to others in the same business area who are not socially disadvantaged."[28] Later, the SBA established by regulation that personal net worth of less than $250,000 at the time of entry into the 8(a) Program ($750,000 for continuing eligibility) constitutes economic disadvantage.[29]

Expansion of the 8(a) Program to Include Small Businesses Owned by "Disadvantaged" Groups

Originally the 8(a) Program was set up exclusively for the benefit of disadvantaged individuals. However, in the 1980's Congress expanded the program to include small businesses owned by four "disadvantaged" owner-groups.

The first owner-group included was Community Development Corporations (CDCs). A CDC is

(...continued)

Determining Group Eligibility for Federal Procurement Preferences, 41 *Santa Clara L. Rev.* 103, 127-29 (2000). Hasidic Jews are, however, eligible to receive assistance from the MDBA. *See* 15 C.F.R. § 1400.1(c) (2009).

[27] 13 C.F.R. § 124.103(c)(2) (2009) (standards of evidence for showing personal disadvantage); 13 C.F.R. § 124.103(b)(3) (2009) (mechanisms for rebutting the presumption of social disadvantage).

[28] P.L. 95-507, § 202.

[29] 13 C.F.R. § 124.104(c)(2). Some commentators estimate that 80 to 90% of Americans are economically disadvantaged under the SBA's net-worth requirements. *See, e.g.*, La Noue & Sullivan, *supra* note 26, at 108.

> … a nonprofit organization responsible to residents of the area it serves which is receiving financial assistance under part 1 [42 USCS §§ 9805 et seq.] and any organization more than 50 percent of which is owned by such an organization, or otherwise controlled by such an organization, or designated by such an organization for the purpose of this subchapter [42 USCS §§ 9801 et seq.].[30]

Congress created CDCs with the Community Development Act of 1981[31] and instructed the SBA to issue regulations ensuring that CDCs could participate in the 8(a) Program.[32]

In 1986, two additional owner-groups, Indian tribes and Alaska Native Corporations, became eligible for the 8(a) Program when Congress passed legislation providing that firms owned by Indian tribes, which included Alaskan Native Corporations (ANCs),[33] were to be deemed "socially disadvantaged" for purposes of the 8(a) Program.[34] In 1992, ANCs were further deemed to be "economically disadvantaged."[35]

The last owner-group, that of Native Hawaiian Organizations (NHOs), was recognized in 1988.[36] An NHO was defined as

> … any community service organization serving Native Hawaiians in the State of Hawaii which—(A) is a nonprofit corporation that has filed articles of incorporation with the director (or the designee thereof) of the Hawaii Department of Commerce and Consumer Affairs, or any successor agency, (B) is controlled by Native Hawaiians, and (C) whose business activities will principally benefit such Native Hawaiians.[37]

8(a) Program at Present: Legal Requirements

Under the current 8(a) Program, participating firms are eligible for set-asides or sole-source awards of federal contracts, as well as training and technical assistance from SBA. Detailed

[30] *Id.* at § 613, codified at 42 U.S.C. § 9802.

[31] P.L. 97-35, Ch. 8, Subch. A, 95 Stat. 489 (1981) (codified at 42 U.S.C. §§ 9801 et seq.).

[32] *Id.* at § 626, 95 Stat. 496 (codified at 42 U.S.C. § 9815).

[33] P.L. 99-272, § 18015, 100 Stat. 370 (1986) (codified at 15 U.S.C.§ 637(a)(13)) (defining "Indian tribe" to include "any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village or regional or village corporation (within the meaning of the Alaska Native Claims Settlement Act (43 U.S.C.§ 1606)) which—(A)is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or (B) is recognized as such by the State in which such tribe, band, nation, group, or community resides.").

[34] *Id.* (codified at 15 U.S.C. § 637(a)(4)). An "Indian Tribe" includes any "Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides." 13 C.F.R. § 124.3. An Alaska Native Corporation is "any Regional Corporation, Village Corporation, Urban Corporation or Group Corporation organized under laws of Alaska in accordance with the Alaska Native Claims Settlement Act." *Id.* An Alaska Native is any "citizen of U.S. who is person one-fourth degree or more Alaskan Indian, Eskimo, Aleut blood, of combination thereof. In absence of proof of minimum bloodlines, it is any citizen whom a Native village or Native groups regards as such provided their father or mother is regarded as an Alaska Native." *Id.*

[35] P.L. 102-415, § 10, 106 Stat. 2115 (1992) (codified at 43 U.S.C. §1626(e)).

[36] P.L. 100-656, § 207, 102 Stat. 3861 (1988) (codified at 15 U.S.C. § 637(a)(4)).

[37] *Id.* (codified at 15 U.S.C. § 637(a)(15)). A "Native Hawaiian" is "any individual whose ancestors were natives, prior to 1778, of [the] area which now comprises [the] state of Hawaii." 13 C.F.R. § 124.3.

statutory and regulatory requirements govern eligibility for the Program; set-asides and sole-source awards to 8(a) firms; and related issues. These requirements are generally the same for all participants in the 8(a) Program, although there are instances where there are "special rules" for 8(a) firms owned by groups.[38] The **Appendix** highlights commonalities and differences in the requirements for various types of 8(a) firms.

Requirements In General

Eligibility for the 8(a) Program

Key among the requirements is that eligibility for the 8(a) Program 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 the United States, and which demonstrate[] potential for success."[39] Each of these terms is further defined by the Small Business Act; regulations that the SBA has promulgated to implement Section 8(a); or judicial or administrative decisions.[40] The eligibility requirements are the same at the time of entry into the 8(a) Program and throughout the Program unless otherwise noted.[41]

"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 Administrator of the SBA.[42] These standards focus primarily upon the size of the business as measured by the number of employees or its gross income, but they also take into account the size of other businesses within the same industry.[43] For example, businesses in the field of "scheduled passenger air transportation" are "small" if they have fewer than 1,500 employees, while those in the data processing field are "small" if they have a gross income of less than $25 million.[44]

Affiliations between businesses, or relationships allowing one party control or the power of control over another,[45] 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

[38] *See, e.g.*, 13 C.F.R. § 124.109(a) ("*Special rules for ANCs*: Small business concerns owned and controlled by ANCs are eligible for participation in the 8(a) program and must meet the eligibility criteria set forth in § 124.112 to the extent the criteria are not inconsistent with this section.").

[39] 13 C.F.R. § 124.101.

[40] 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 affliations. *See* Valenzuela Eng'g, Inc. & Curry Contracting Co., Inc., SBA-4151 (1996).

[41] *See* 13 C.F.R. § 124.112 (a) ("In order for a concern ... to remain eligible for 8(a) ... program participation, it must continue to meet all eligibility criteria contained in [Section] 124.101 through [Section] 124.108.").

[42] 15 U.S.C. § 632(a)(1)-(2)(A).

[43] 13 C.F.R. §§ 121.101-121.108. The number of employees is the average of each pay period for the preceding twelve calendar months. Gross income is 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* IMDT, Inc., SBA-4121 (1995).

[44] 13 C.F.R. § 121.201.

[45] 13 C.F.R. § 121.103(a)(1). Control or the power of control need only exist. It need not be exercised for affiliation to be found.

domestic and foreign affiliates, regardless of whether the affiliates are organized for profit."[46] Businesses can thus be determined to be other than small because of their involvement in joint ventures,[47] subcontracting arrangements,[48] or franchise or license agreements,[49] among other things, provided that their personnel numbers or income, plus those of their affiliate(s), are over the pertinent size threshold.

"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.[50] For purposes of the 8(a) Program, businesses may take the form of individual proprietorships, partnerships, limited liability corporations, corporations, joint ventures, associations, trusts, or cooperatives.[51]

"Unconditionally owned and controlled"

Participants in the 8(a) Program must be "at least 51% unconditionally and directly owned by one or more disadvantaged individuals who are citizens of the United States" unless they are owned by an Indian tribe, ANC, NHO, or CDC.[52] Ownership is "unconditional" when it is not subject to any conditions precedent or subsequent, executory agreements, voting trusts, restrictions on voting rights, or other arrangements that could cause the benefits of ownership to go to another entity.[53] 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).[54] Non-disadvantaged individuals and non-participant businesses that own at least 10% of an 8(a) business may own no more than 10 to 20% of any other 8(a) firm.[55] Non-participant businesses that earn the majority of their revenue in the same or similar line of business are similarly barred from owning more than 10 to 20% of another 8(a) firm.[56]

---

[46] 13 C.F.R. § 121.103(a)(6).

[47] 13 C.F.R. § 121.103(h) ("[T]he joint venture entity cannot submit more than three offers over a two year period, starting from the date of the submission of the first offer.").

[48] 13 C.F.R. § 121.103(h)(4) ("A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract ... or a subcontractor upon which the prime contractor is unusually reliant.").

[49] 13 C.F.R. § 121.103(i) ("Affiliation may arise ... through ... common ownership, common management or excessive restrictions on the sale of the franchise interest.").

[50] 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).

[51] 13 C.F.R. § 121.105(b).

[52] 15 U.S.C. § 637(a)(4)(A)(i)-(ii) (requiring at least 51% unconditional ownership);13 C.F.R. § 124.105.

[53] 13 C.F.R. § 124.3.

[54] 13 C.F.R. § 124.105(a).

[55] 13 C.F.R. § 124.105(h)(1). Ownership is limited to 10% when the 8(a) firm in is the "developmental stage" of the 8(a) Program and 20% when it is in the "transitional stage." *Id.* The developmental stage consists of the first four years of the 8(a) Program, while the transitional stage consists of the last five years. Firms in the transitional stage must earn ever increasing percentages of their revenue from non-8(a) sources, as discussed below.

[56] 13 C.F.R. § 124.105(h)(2).

Participants must also be controlled by one or more disadvantaged individuals.[57] "Control is not the same as ownership" and includes both strategic policy setting and day-to-day management and administration of business operations.[58] Management and daily business operations must also be conducted by one or more disadvantaged individuals unless the 8(a) business is owned by an Indian tribe, ANC, NHO, or CDC.[59] 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."[60] A disadvantaged individual must hold the highest officer position within the business.[61] Non-disadvantaged 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.[62] However, they may not exercise actual control or have power to control, or receive compensation greater than that of highest officer without SBA approval.[63]

"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."[64] Members of designated groups, listed in **Table 1**, are entitled to a rebuttable presumption of social disadvantage for purposes of the 8(a) Program,[65] although this presumption can be overcome with "credible evidence to the contrary."[66] Individuals who are not members of designated groups must prove they are socially disadvantaged by a preponderance of the evidence.[67] Such 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.[68] In assessing the third factor, the SBA will consider all relevant evidence produced by the applicant, but must consider the applicant's education, employment, and business history to see if the totality of the circumstances shows disadvantage.[69] Other groups not included

[57] 15 U.S.C. § 637(a)(4)(A)(i)-(ii) (requiring control of management and daily business operations); 13 C.F.R. § 124.106.

[58] *Id.*

[59] *Id.*

[60] 13 C.F.R. § 124.106(a)(3).

[61] 13 C.F.R. § 124.106(a)(2).

[62] 13 C.F.R. § 124.106(e).

[63] 13 C.F.R. § 124.106(e)(1) & (3).

[64] 15 U.S.C. § 637(a)(5); 13 C.F.R. § 124.103(a).

[65] 13 C.F.R. § 124.103(b)(1). If required by the SBA, individuals claiming membership in these groups must demonstrate that they held themselves out and are recognized by others as members of the designated group(s). 13 C.F.R. § 124.103(b)(2).

[66] 13 C.F.R. § 124.103(b)(3).

[67] 13 C.F.R. § 124.103(c)(1).

[68] 13 C.F.R. § 124.103(c)(2)(i)-(iii).

[69] 13 C.F.R. § 124.103(c)(2)(iii).

in **Table 1** may obtain listing by demonstrating disadvantage by a preponderance of the evidence.[70]

"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 financial capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged."[71] Individuals claiming economic disadvantage must describe it in a personal statement and submit financial documentation.[72] The SBA will examine their personal income for the past two years, their personal net worth, and the fair market value of the assets they own, as well as financial profiles of small businesses in the same primary industry or similar line of business.[73] However, principal ownership in a prospective or current 8(a) business is excluded when calculating net worth, as is equity in individuals' primary residence.[74] For initial eligibility, applicants to the 8(a) Program must have a net worth of less than $250,000.[75] For continued eligibility, net worth must be less than $750,000.[76]

"Good character"

In determining whether an applicant to or participant in the 8(a) Program possesses "good character," the SBA looks for criminal conduct, violations of SBA regulations, or current debarment or suspension from government contracting.[77]

"Demonstrated potential for success"

For a firm to have demonstrated potential for success, it generally must have been in business in the field of its primary industry classification for at least two full years immediately prior to the date of its application to the 8(a) Program.[78] However, the SBA may grant a waiver allowing firms that have been in business for less than two years to enter the 8(a) Program when (1) the disadvantaged individuals 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

[70] 13 C.F.R. § 124.103(d)(4). Groups petitioning for recognition as socially disadvantaged do not always obtain it. Over the years, the SBA has rejected petitions from Hasidic Jews, women, disabled veterans, and Iranian-Americans. *See supra* note 26.

[71] 15 U.S.C. § 637(a)(6)(A); 13 C.F.R. § 124.104(a).

[72] 13 C.F.R. § 124.104(b)(1).

[73] 15 U.S.C. § 637(a)(6)(E)(i)-(ii); 13 C.F.R. § 124.104(c).

[74] 13 C.F.R. § 124.104(c)(2)(ii).

[75] *Id.*

[76] *Id.*

[77] 13 C.F.R. § 124.108(a). For more on debarment and suspension, see CRS Report RL34753, *Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments*, by Kate M. Manuel.

[78] 13 C.F.R. § 124.107. Specifically, "[i]ncome tax returns for each of the two previous tax years must show operating revenues in the primary industry in which the applicant is seeking 8(a) ... certification." 13 C.F.R. § 124.107(a).

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 contracts under Section 8(a).[79]

Set-Asides and Sole-Source Awards Under Section 8(a)

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 small businesses participating in the 8(a) Program.[80] A "set-aside" is an acquisition in which only certain contractors may compete, while a sole-source award is a contract awarded, or proposed for award, without competition.[81] Although the Competition in Contracting Act (CICA) generally requires "full and open competition" for government procurement contracts, set-asides and sole-source awards are both permissible under CICA. In fact, an 8(a) set-aside is a recognized competitive procedure.[82] Agencies are effectively encouraged to subcontract through the 8(a) Program because there are government-wide and agency-specific goals regarding the percentage of procurement dollars awarded to "small disadvantaged businesses," among others.[83] Awards made via set-asides or on a sole-source basis count toward these goals,[84] and businesses participating in the 8(a) Program are considered small disadvantaged businesses.[85]

[79] 15 U.S.C. § 637(a)(7)(A) ("reasonable prospects for success"); 13 C.F.R. § 124.107(b)(i)-(v).

[80] SBA may delegate the function of executing contracts to the procuring agencies and often does so. *See* 13 C.F.R. § 124.501(a).

[81] An acquisition is a procurement. Set-asides may be total or partial. *See* 48 C.F.R. § 19.502-3(a). The federal government presently has several other programs authorizing set-asides and sole-source awards for various subcategories of small businesses. *See generally* CRS Report R40591, *Set-Asides for Small Businesses: Recent Developments in the Law Regarding Precedence Among the Set-Aside Programs and Set-Asides Under Indefinite-Delivery/Indefinite-Quantity Contracts*, by Kate M. Manuel.

[82] 15 U.S.C. § 644(a) (describing when set-asides for small businesses are permissible); 41 U.S.C. § 253(b)(2) (CICA provision authorizing set-asides for small businesses); 48 C.F.R. §§ 6.203-6.206 (authorizing set-asides for small business generally, 8(a) small businesses, Historically Underutilized Business Zone (HUBZone) small businesses, and service-disabled veteran-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 Government in each industry category are placed with small-business concerns." 41 U.S.C. § 253(b)(1); 41 U.S.C. § 259(b). CICA also authorizes sole-source awards when, among other things, the property or services needed by a government agency are available from only one responsible source and no other type of property or service will satisfy the agency's needs. 10 U.S.C. § 2304(c)(1) (defense agency procurements) & 41 U.S.C. § 253(c)(1) (civilian agency procurements). For more on competition in federal contracting, see CRS Report R40516, *Competition in Federal Contracting: An Overview of the Legal Requirements*, by Kate M. Manuel.

[83] 15 U.S.C. § 644(g)(1)-(2).

[84] They also count toward a separate goal for the percentage of federal procurement dollars awarded to small businesses generally. Currently, the government-wide goal is that 5% of all federal contract dollars be spent with small disadvantaged businesses, including 8(a) businesses, while agency-specific goals range from 1.6% (Department of Energy) to 5%. Small Bus. Admin., FY2006-FY2008 Goals and Achievements, *available at* http://www.sba.gov/aboutsba/sbaprograms/goals/index.html. The government-wide goal was met in FY2008, the most recent year for which information is available. Small Bus. Admin., FY2008 Government-Wide Score Card, *available at* http://www.sba.gov/idc/groups/public/documents/sba_homepage/goals_08_gov_wide.pdf. Agency performance varies, with some agencies under, some agencies at, and some agencies exceeding their goals. Small Bus. Admin., FY2008 Goals and Achievements, *available at* http://www.sba.gov/idc/groups/public/documents/sba_homepage/fy2008goals_and_achievements.html.

[85] *See* 13 C.F.R. § 124.1002 (defining "small disadvantaged business").

Discretion to Subcontract Through the 8(a) Program

There are few limits on agency discretion to subcontract through the 8(a) Program.[86] By regulation, the SBA is prohibited from accepting procurements for award under Section 8(a) when

1. the procuring agency issued a solicitation for or otherwise expressed publicly a clear intent to reserve the procurement as a small business set-aside prior to offering the requirement to SBA for award as an 8(a) contract;[87]
2. the procuring agency competed the requirement among 8(a) firms prior to offering the requirement to SBA and receiving SBA's formal acceptance of it;
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."[88]

SBA is also 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."[89] 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."[90] Moreover, the Government Accountability Office will generally not hear protests of agencies' determinations to procure, or not to procure, under the 8(a) Program absent a showing that the regulations may have been violated or that government officials acted in bad faith.[91]

---

[86] *See, e.g.*, AHNTECH, Inc., B-401092, Comp. Gen. Dec. (Apr. 22, 2009) ("The [Small Business] Act affords the SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program.").

[87] Even in this situation, SBA may accept the requirement under "extraordinary circumstances." 13 C.F.R. § 124.504(a); Madison Servs., Inc., B-400615 (Comp. Gen. Dec., Dec. 11, 2008) (finding that extraordinary circumstances existed when the agency's initial small business set-aside was erroneous and did not reflect its intentions).

[88] 13 C.F.R. § 124.504(a)-(c). The third provision applies only to preexisting requirements. It does not apply to new contracts, follow-on or renewal contracts, or procurements under $100,000. *Id.* Also under its regulations, 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).

13 C.F.R. § 124.504(c)(1)(A)-(C).

[89] 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) & (c).

[90] 15 U.S.C. § 637(a)(1)(A). *See also* Totolo v. United States, 2009 U.S. Claims LEXIS 221, at *42-*43 (June 15, 2009) ("The manner in which [an agency] assesses its needs is a business judgment and lies within its own discretionary domain."); JT Constr. Co., B-254257 (Comp. Gen. Dec. 6, 1993) (stating that it is a business judgment, within the contracting officer's discretion, to decide not to set aside a competition for small businesses).

[91] 4 C.F.R. § 21.5(b)(3); Rothe Computer Solutions, LLC, B-299452, Comp. Gen. Dec. (May 9, 2007).

Monetary Thresholds and Subcontracting Mechanism Under 8(a)

Once the SBA has accepted a contract for the 8(a) Program, the contract is awarded either through a set-aside or on a sole-source basis, with the amount of the contract generally determining the acquisition method used. When the anticipated total value of the contract, including any options, is less than $3.5 million ($5.5 million for manufacturing contracts), the contract is normally awarded without competition.[92] However, agencies can make competitive awards for contracts whose anticipated value is less than $3.5 million ($5.5 million for manufacturing contracts) provided that the SBA's Associate Administrator for 8(a) Business Development approves the agency's request to do so.[93] In contrast, when the anticipated value of the contract exceeds $3.5 million ($5.5 million for manufacturing contracts), 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.[94] Sole-source awards of contracts valued at $3.5 million or more ($5.5 million or more for manufacturing contracts) may only be made when (1) there is not a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers at a fair market price or (2) the SBA accepts the requirement on behalf of an 8(a) firm owned by an Indian tribe, an ANC or, in the case of Department of Defense contracts, an NHO.[95] Agencies may not divide acquisitions valued at more than $3.5 million ($5.5 million for manufacturing contracts) into several acquisitions at lesser amounts in order to make sole-source awards.[96]

Figure 1. Acquisition Methods at Various Price Thresholds

Source: Congressional Research Service.

---

[92] 15 U.S.C. §637(a)(16)(A). A noncompetitive 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).

[93] 15 U.S.C. § 637(a)(1)(D)(ii); 48 C.F.R. § 19.805-1(d).

[94] 15 U.S.C. § 637(a)(1)(D)(i)(I)-(II); 48 C.F.R. § 19.805-1(a)(1)-(2).

[95] 48 C.F.R. § 19.805-1(b)(1)-(2) (sole-source awards to tribally or ANC-owned firms); 48 C.F.R. § 219.805-1(b)(2)(A)-(B) (sole-source awards to NHO-owned firms). If an agency makes a sole-source award in reliance on the first exception, it must issue a justification for doing so and have that justification approved by the contracting officer's superiors. 10 U.S.C. § 2304(f)(1)(A)-(B) (defense agency procurements) & 41 U.S.C. § 253(f)(1)(A)-(B) (civilian agency procurements). No justification or approval is required when the second exception is used, however.

[96] 48 C.F.R. § 19.805-1(c).

Other Requirements

Other key requirements of the 8(a) Program include the following:

- ***Inability to protest an 8(a) firm's eligibility for an award***: When the SBA makes or proposes an award to an 8(a) firm, that firm's eligibility for the award cannot be challenged or protested as part of the solicitation or proposed contract award. Instead, information concerning a firm's eligibility for the 8(a) Program must be submitted to SBA in accordance with separate requirements contained in 13 C.F.R. § 124.517.[97]
- ***Maximum of nine years in the 8(a) Program***: Firms may participate in the 8(a) Program for no more than nine years from the date of their admission into the Program, although they may be terminated or graduate from the program before nine years have passed.[98]
- ***One-time eligibility for the 8(a) Program***: Once a firm or a disadvantaged individual upon whom a firm's eligibility was based has exited from the 8(a) Program after participating in it for any length of time, neither the firm nor the individual is eligible to participate in the 8(a) Program again.[99] When at least 50% of the assets of one firm are the same as those of another firm, the firms are considered identical for purposes of eligibility for the 8(a) Program.[100]
- ***Limits on majority ownership in 8(a) firms***: Individuals who have been determined to be disadvantaged for purposes of one 8(a) firm, their immediate family members, and 8(a) firms themselves may generally not own more than 20% of any other 8(a) firm.[101]
- ***Limits on the amount of 8(a) contracts that a firm may receive***: 8(a) firms may generally not receive additional sole-source awards once they have received a combined total of competitive and sole-source awards in excess of $100 million, in the case of firms whose size is based on their number of employees, or in excess of an amount equivalent to the lesser of (1) $100 million or (2) five times the size standard for the industry, in the case of firms whose size is based on their revenues.[102] Additionally, 8(a) firms in either the "developmental stage," or the first four years of participation in the 8(a) Program, or the "transitional stage," or the last five years of participation, must achieve annual targets for the amount of

[97] 48 C.F.R. § 19.805-2(d).

[98] 15 U.S.C. § 636(j)(10)(C)(i) (nine-year term); 15 U.S.C. § 637(a)(9) (termination and early graduation); 13 C.F.R. § 124.301 (exiting the 8(a) Program); 13 C.F.R. § 124.302 (early graduation); 13 C.F.R. § 124.303 (termination from the Program).

[99] 15 U.S.C. § 636(j)(11)(B)-(C); 13 C.F.R. § 124.108(b).

[100] 13 C.F.R. § 124.108(b)(4).

[101] 13 C.F.R. § 124.105(g).

[102] 13 C.F.R. § 124.519(a)(1)-(2). Contracts less than $100,000 are not counted in determining whether a firm has reached the applicable limit. 13 C.F.R. § 124.519(a)(3). The Administrator of the SBA may waive this requirement if the head of the procuring agency determines that a sole-source award to a firm is necessary "to achieve significant interests of the Government." 13 C.F.R. § 124.519(f). Even after they have received a combined total of competitive and sole-source awards in excess of $100 million, or other applicable amount, firms may still receive competitive contracts under the 8(a) Program. 13 C.F.R. § 124.519(b).

revenues they receive from non-8(a) sources.[103] These targets increase over time, with firms required to attain 15% of their revenue from non-8(a) sources in the fifth year; 25% in the sixth year; 35% in the seventh year; 45% in the eight year; and 55% in the ninth year.[104] 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.[105]

- ***Limitations on subcontracting***: Although not only under the authority of Section 8(a) of the Small Business Act or applicable only to 8(a) businesses, limitations on subcontracting require that small businesses receiving contracts under a set-aside perform minimum percentages of the contract work.[106] These percentages vary depending upon the type of the contract, with employees of the small business required to perform (1) at least 50% of the personnel costs of service contracts; (2) at least 50% of the costs of manufacturing (excluding materials) in supply contacts; (3) at least 15% of the costs of construction (excluding materials) in general construction contracts; and (4) at least 25% of the costs of construction (excluding materials) in "special trade" construction contracts.[107]

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

Tribes, ANCs, NHOs or 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 8(a) Program,[108] although the rules governing their participation are, in places, somewhat different from those for the 8(a) Program generally.[109]

[103] 15 U.S.C. § 636(j)(10)(I)(i)-(iii); 13 C.F.R. § 124.509(b)(1).

[104] 13 C.F.R. § 124.509(b)(2).

[105] 13 C.F.R. § 124.509(d)(1). This prohibition may be waived when the Director of the Office of Business Development finds that denial of a sole-source contract would cause severe economic hardship for the firm, potentially jeopardizing its survival, or extenuating circumstances beyond the firm's control caused it to miss its target. *Id*.

[106] 15 U.S.C. 637(a)(14)(A)-(B); 15 U.S.C. § 644(o); 13 C.F.R. § 125.6; 48 C.F.R. § 52.219-14.

[107] 13 C.F.R. § 124.510 (limits on subcontracting for 8(a) firms); 13 C.F.R. § 125.6(a)(1)-(4) (limits on subcontracting for small businesses generally). The Government Accountability Office has criticized the SBA for poor monitoring of the percentage of work performed by subcontractors on 8(a) contracts with ANC-owned firms, and some commentators have criticized ANC-owned firms for subcontracting with companies that are themselves ineligible for the 8(a) program. *See* Gov't Accountability Office, Increased Used of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight, GAO-06-399, at 6 (Apr. 2006); Michael Scherer, Little Big Companies: How Did Corporations Like Halliburton Get Millions in Government Contracts Designated for Small Minority Businesses?, *Mother Jones Mag.*, Jan./Feb. 2005, *available at* http://www.motherjones.com/commentary/notebook/2005/01/11_400.html. However, any 8(a) firm may subcontract with a "large business" provided that the subcontracting relationship is not such as to result in affiliation and the 8(a) firm directly performs the required percentage of the contract costs with its own personnel.

[108] 13 C.F.R. § 124.109(c)(3)(i) (tribally and ANC-owned firms); 13 C.F.R. § 124.111(c) (CDC-owned firms).

[109] 13 C.F.R. §§ 124.109-124.111.

Eligibility for the 8(a) Program

"Small"

Firms owned by Indian tribes, ANCs, NHOs, and CDCs must be "small" under the SBA's size standards.[110] However, certain affiliations with the owning entity or other business enterprises of that entity are excluded in size determinations *unless* the Administrator of the SBA determines that, because of such exclusions, a small business owned by an Indian tribe, ANC, NHO, or CDC "[has] obtained, or [is] likely to obtain, a substantial unfair competitive advantage within an industry category."[111] Other affiliations of small businesses owned by Indian tribes, ANCs, NHOs, or CDCs can count in size determinations, and ANC-owned firms, in particular, have been subjected to early graduation from the 8(a) Program because they exceeded the size standards.[112]

"Business"

Firms owned by Indian tribes, ANCs, NHOs, and CDCs must be "businesses" under the SBA's definition.[113] Although ANCs themselves may be for-profit or non-profit, ANC-owned businesses must be for-profit to participate in the 8(a) Program.[114]

"Unconditionally owned and controlled"

Firms owned by Indian tribes, ANCs, NHOs, and CDCs must be unconditionally owned and substantially controlled by the tribe, ANC, NHO, or CDC, respectively.[115] 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 SBA determines

---

[110] 13 C.F.R. § 124.109(c)(2)(i) (tribally and ANC-owned firms); 13 C.F.R. § 124.110(b) (NHO-owned firms); 13 C.F.R. § 124.111(c) (CDC-owned firms).

[111] 13 C.F.R. § 124.109(c)(2)(iii) (tribally and ANC-owned firms); 13 C.F.R. § 124.110(b) (NHO-owned firms); 13 C.F.R. § 124.111(c) (CDC-owned firms). The language here, stating that "any other business enterprise owned by [an organization]" shall be excluded from the size determination, seems somewhat contrary to that in 13 C.F.R. § 121.103(2)(ii), which suggests that businesses owned and controlled by organizations could be found to be affiliates of the organization for reasons other than common ownership or management, or performance of common administrative services. According to the GAO, some agency contracting officers reported not knowing how to determine what constitutes a "substantial unfair competitive advantage" when making size determinations for ANC-owned firms in particular. *See* Increased Used of Alaska Native Corporations' Special 8(a) Provisions, *supra* note 107, at 37.

[112] *See, e.g.*, 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); Increased Used of Alaska Native Corporations' Special 8(a) Provisions, *supra* note 107, at 29 (describing "early graduation" of ANC-owned 8(a) firms).

[113] 13 C.F.R. § 124.109(a) & (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); 13 C.F.R. § 124.111(a) (similar provision for CDC-owned firms).

[114] 13 C.F.R. § 124.109(a)(3).

[115] 13 C.F.R. § 124.109(a) & (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); 13 C.F.R. § 124.111(a) (similar provision for CDC-owned firms).

> … that such management is required to assist the [firm's] development, that the tribe 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 plan exists which shows how disadvantaged tribal members will develop managerial skills sufficient to manage the concern or similar tribally-owned concerns in the future.[116]

The rules governing NHO-owned firms do not address this issue,[117] and although the general rules apply where no "special rules" exist,[118] it seems unlikely that NHO-owned firms are treated differently from tribally or ANC-owned firms in this regard. 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]."[119]

"Socially disadvantaged"

As owners of prospective or current 8(a) firms, Indian tribes, ANCs, NHOs, and CDCs are all presumed to be socially disadvantaged.[120]

"Economically disadvantaged"

By statute, ANCs are deemed to be economically disadvantaged,[121] and by regulation, CDCs are similarly presumed to be economically disadvantaged.[122] Indian tribes and NHOs, in contrast, must establish economic disadvantage at least once. Indian tribes must present data on, among other things the number of tribe members; the tribal unemployment rate; the per capita income of tribe members; the percentage of the local Indian population above the poverty level; the tribe's assets as disclosed in current financial statements; and all businesses wholly or partially owned by

[116] 13 C.F.R. § 124.109(c)(4)(B).

[117] *See* 13 C.F.R. § 124.110.

[118] *Id.* ("Concerns owned by economically disadvantaged Native Hawaiian Organizations, as defined in [Section] 124.3, are eligible for participation in the 8(a) program and other federal programs requiring SBA to determine social and economic disadvantage as a condition of eligibility. Such concerns must meet all eligibility criteria set forth in [Section] 124.101 through 124.108 and [Section] 124.112 to the extent that they are not inconsistent with this section.").

[119] 13 C.F.R. § 124.111(b).

[120] 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); *See* 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."). SBA's authority to designate CDCs as socially and economically disadvantaged derives from 42 U.S.C. § 9815(a)(2), although the SBA does not currently have regulations addressing this issue. *See* 42 U.S.C. § 9815(a)(2) ("Not later than 90 days after August 13, 1981, the Administrator of the Small Business Administration, after consultation with the Secretary, shall promulgate regulations to ensure the availability to community development corporations of such programs as shall further the purposes of this subchapter, including programs under section 637(a) of title 15.").

[121] 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) (same).

[122] *See* Small Disadvantaged Business Certification Application, *supra* note 120.

tribal enterprises or affiliates, as well as their primary industry classification.[123] However, once a tribe 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 8(a) Program *unless* the Director of the Office of Business Development requires it to do so.[124] The rules governing NHO-owned firms do not address this issue,[125] and although the general rules apply where no "special rules" exist,[126] it seems unlikely that NHO-owned firms are treated differently from tribally owned firms in this regard.

"Good character"

When an organization owns an actual or prospective 8(a) firm, all members, officers, or employees of that organization are generally not required to show good character. The regulations governing tribally and ANC-owned firms explicitly address the issue, stating that the "good character" requirement applies only to officers or directors of the firm, or shareholders owning more than a 20% interest.[127] However, NHO-owned firms may be subject to the same requirements in practice.[128] With CDC-owned firms, the firm itself and "all of its principals" must have good character.[129]

"Demonstrated potential for success"

Firms owned by Indian tribes, ANCs, NHOs, and CDCs must either show demonstrated potential for success by having been in business in their primary industry for at least two full years immediately prior to the date of their application to the 8(a) Program or receive a waiver from the SBA.[130] Waivers are based on three criteria where firms owned by Indian tribes, ANCs, NHOs, and CDCs are involved: (1) the technical and managerial experience and competency of the individuals who will manage and control the firm's daily operations; (2) the firm's financial capacity; and (3) the firm's record of performance on prior federal or other contracts in its primary industry.[131] These criteria differ in their number and wording from the waiver criteria for other 8(a) firms.[132] However, these differences are unlikely to result in group-owned firms receiving waivers where other 8(a) firms would not because the criteria are analogous.

---

[123] 15 U.S.C. § 637(a)(6)(A); 13 C.F.R. § 124.109(b)(2)(i)-(vii).

[124] 13 C.F.R. § 124.109(b).

[125] *See* 13 C.F.R. § 124.110.

[126] *Id.* ("Concerns owned by economically disadvantaged Native Hawaiian Organizations, as defined in [Section] 124.3, are eligible for participation in the 8(a) program and other federal programs requiring SBA to determine social and economic disadvantage as a condition of eligibility. Such concerns must meet all eligibility criteria set forth in [Section] 124.101 through 124.108 and [Section] 124.112 to the extent that they are not inconsistent with this section.").

[127] 13 C.F.R. § 124.109(b)(7)(ii).

[128] *See supra* note 126 and accompanying text.

[129] 13 C.F.R. § 124.111(g).

[130] 13 C.F.R. § 124.109(c)(6) (tribally and ANC-owned firms); 13 C.F.R. § 124.110(e) (NHO-owned firms); 13 C.F.R. § 124.111(f)(2)(i)-(iii) (CDC-owned firms).

[131] 13 C.F.R. § 124.109(c)(6)(ii)(A)-(C) (tribally and ANC-owned firms); 13 C.F.R. § 124.110(e)(2)(i)-(iii) (NHO-owned firms); 13 C.F.R. § 124.111(f) (CDC-owned firms).

[132] *See* 13 C.F.R. § 124.107(b)(i)-(v).

Set-Asides and Sole-Source Awards

Like other participants in the 8(a) Program, firms owned by Indian tribes, ANCs, NHOs, and CDCs are eligible for 8(a) set-asides and may receive sole-source awards valued at less than $3.5 million ($5.5 million for manufacturing contracts). However, firms owned by Indian tribes and ANCs can also receive sole-source awards in excess of $3.5 million ($5.5 million for manufacturing contracts) even when contracting officers reasonably expect that that at least two eligible and responsible 8(a) firms will submit offers and the award can be made at fair market price.[133] NHO-owned firms may receive sole-source awards from the Department of Defense under the same conditions.[134]

Other Requirements

Firms owned by Indian tribes, ANCs, NHOs, and CDCs are governed by the same regulations as other 8(a) firms where certain of the "other requirements" are involved, including (1) inability to protest an 8(a) firm's eligibility for an award;[135] (2) maximum of nine years in the 8(a) Program (for individual firms);[136] and (3) limits on subcontracting.[137] However, the requirements for such firms differ somewhat from those for other 8(a) firms where one-time eligibility for the 8(a) Program; limits on majority ownership of 8(a) firms; and limits on the amount of 8(a) contracts that a firm may receive are involved. Firms owned by Indian tribes, ANCs, NHOs, and CDCs may participate in the 8(a) Program only one time.[138] However, unlike the disadvantaged individuals upon whom other firms' eligibility for the 8(a) Program is based, Indian tribes, ANCs, NHOs, and CDCs may confer eligibility for the 8(a) Program upon firms on multiple occasions and for an indefinite period.[139] Additionally, although Indian tribes, ANCs, NHOs, and CDCs may not own 51% or more of a firm obtaining the majority of its revenues from the same "primary" industry in which another firm they own or owned currently operates or has operated within the past two years, there are no limits on the number of firms they may own that operate in other primary industries.[140] Moreover, Indian tribes, ANCs, NHOs, and CDCs may own multiple firms

[133] An Act To Amend the Small Business Act To Reform the Capital Ownership Development Program, and for Other Purposes; P.L. 100-656, § 602(a), 102 Stat. 3887-88 (Nov. 15, 1988) (codified at 15 U.S.C. § 637 note); 48 C.F.R. § 19.805-1(b)(2).

[134] The authority for DOD to make sole-source awards to NHO-owned firms of contracts valued at more than $3.5 million ($5.5 million for manufacturing contracts) even if contracting officers reasonably expect that offers will be received from at least two responsible small businesses existed on a temporary basis in 2004-2006 and became permanent in 2006. *See* Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, P.L. 109-148, § 8020, 119 Stat. 2702-03 (Dec. 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).

[135] *See supra* note 97.

[136] 13 C.F.R. § 124.109(a) & (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); 13 C.F.R. § 124.111(a) (similar provision for CDC-owned firms).

[137] 15 U.S.C. § 644(o); 13 C.F.R. § 125.6; 48 C.F.R. § 52.219-14.

[138] *Id.*

[139] *Id.*; 15 U.S.C. § 636(j)(11)(B)-(C).

[140] 13 C.F.R. § 124.109(c)(3)(ii) (tribally and ANC-owned firms); 13 C.F.R. § 124.110(c) (NHO-owned firms); 13 C.F.R. § 124.111(d) (CDC-owned firms). GAO has also faulted agencies' tracking of the industries in which 8(a) firms (continued...)

that earn less than 50% of their revenue in the same “secondary” industries.[141] Finally, firms owned by Indian tribes or ANCs may continue to receive additional sole-source awards even after they have received awards valued at $100 million, or other applicable amount, although firms owned by NHOs and CDCs may not.[142] However, firms owned by any of these four types of entities are subject to the same requirements regarding the percentages of revenue received from non-8(a) sources at various stages of their participation in the 8(a) Program as other 8(a) firms are.[143]

Future of the 8(a) Program?

Although the 8(a) Program has expanded fairly consistently since FY2000, as **Table 2** illustrates, and the SBA credited it with helping firms to make “significant contributions to the Federal, state and local tax base and contribute[ing] an estimated 191,973 jobs to the Nation’s economy” in FY2008,[144] the Program is not static. Rather, it continues to evolve as the result of legislation, changes in executive branch policies, and legal challenges and decisions. This section provides an overview of emerging developments that may shape the future of the 8(a) Program.

Table 2. Trends in 8(a) Participation

FY2000-FY2008

Fiscal Year	Number of 8(a) Firms	Total Revenue Firms Received under 8(a)	Percentage of Firms’ Revenue Received from 8(a)
FY2000	6383	3.78 billion	28.2%
FY2001	6942	4.66 billion	26.01%
FY2002	7585	4.4 billion	29.4%
FY2003	8431	5.4 billion	27.5%
FY2004	8900	5.6 billion	27.58%
FY2005	9470	7.0 billion	30.91%
FY2006	9667	7.1 billion	30.2%
FY2007	9423	6.7 billion	30.4%
FY2008	9462	6.3 billion	61.2%

(...continued)

have contracts to ensure compliance with this rule. *See Northern Lights and Procurement Plights: The Effects of the ANC Program on Federal Procurement and Alaska Native Corporations*, Joint Hearing Before the Comm. on Gov. Reform & the Comm. on Small Bus., House of Representatives, 109th Cong., 2d Sess., at 134-35 (June 21, 2006) (statement of David Cooper, Director, Acquisition and Sourcing Management, GAO).

141 13 C.F.R. § 124.109(c)(3)(ii) (tribally and ANC-owned firms); 13 C.F.R. § 124.110(c) (NHO-owned firms); 13 C.F.R. § 124.111(d) (CDC-owned firms).

142 13 C.F.R. § 124.519(a).

143 13 C.F.R. § 124.509.

144 Small Bus. Admin., Office of Business Development, 2008 Report to Congress, at 6, *available at* http://www.sba.gov/idc/groups/public/documents/sba_program_office/8abd_408_fy2008report.pdf.

Source: Congressional Research Service, based on data in Office of Business Development, Annual Report to Congress, 2000-2008.

Proposed Legislation

Recent Congresses have considered several bills that would modify the 8(a) Program. These proposed modifications often reflect concerns that Members or commentators have about the program, such as: (1) whether the Program's eligibility requirements exclude certain small businesses that could benefit from the Program;[145] (2) whether the Program adequately serves participating businesses;[146] (3) whether the federal government awards too few of its procurement dollars to small disadvantaged businesses;[147] (4) fraud by businesses participating in the Program;[148] and (5) whether SBA and/or contracting agencies adequately oversee 8(a) contracts.[149] Recently, sole-source awards to ANC-owned firms under the authority of Section 8(a) have been a particular concern.[150] Some worry that the increase in the percentage of federal contract dollars awarded to ANC-owned firms under Section 8(a), which reportedly went from $1.1 billion in FY2004 to $3.9 billion in FY2008, diminishes the percentage of contract dollars available for other small businesses or 8(a) firms.[151] They also fear that that agencies improperly use sole-source awards to ANC-owned firms,[152] sole-source awards to ANC-owned firms cost too much,[153] or SBA and/or other federal agencies do not properly administer sole-source contracts to ANC-owned firms.[154] However, others desire to preserve, if not expand, the contracting programs for ANCs because of the benefits they provide to Alaska Natives.[155] Bills introduced in the 110th and 111th Congress took various approaches to the 8(a) Program, as described below.

---

[145] *See, e.g.*, *Federal Contracting: Removing Hurdles for Minority-Owned Small Businesses*, Hearing Before the Subcomm. on Gov't Mgmt., Org. & Procurement of the Comm. on Oversight & Gov't Reform, U.S. House of Representatives, 110th Cong., 1st Sess., at 68 (Sept. 26, 2007) (statement of Michael I. Barrera, President & CEO of the United States Hispanic Chamber of Commerce) (advocating removal of the net worth requirement for ongoing eligibility in the 8(a) Program).

[146] *See, e.g.*, Gov't Accountability Office, SBA Could Better Focus Its 8(a) Program to Help Firms Obtain Contracts, GAO RCED 00-196 (reporting that 8(a) firms expect SBA to help them obtain contracts, while SBA focuses on business development activities).

[147] *See, e.g.*, Minority Small Business Enhancement Act of 2009, H.R. 2299, § 5 (proposing to increase the goals for contracting with small disadvantaged businesses, among others).

[148] *See, e.g.*, Gov't Accountability Office, Agency Should Assess Resources Devoted to Contracting and Improve Several Processes in the 8(a) Program, GAO RCED-00-196 (noting widespread fraud in the 8(a) Program).

[149] *See, e.g.*, *id*. (noting that SBA lacks personnel to perform effective monitoring of contracts); Gov't Accountability Office, SBA's 8(a) Information System Is Flawed and Does Not Support the Program's Mission, GAO RCED-00-197.

[150] *See, e.g.*, Robert Brodsky, Senate Panel to Probe Alaska Native Contracting Preferences, *Gov't Exec.*, May, 15, 2009, *available at* http://www.govexec.com/dailyfed/0509/051509rb2.htm (describing plans for the July 16, 2009 hearing).

[151] *See, e.g.*, ANCs Receiving Disproportionate Share of SBA 8(a) Program Awards, Panel Told, 92 *Fed. Contr. Rep.* 50 (July 21, 2009).

[152] *See, e.g.*, Increased Used of Alaska Native Corporations' Special 8(a) Provisions, *supra* note 107, at 22 (noting agencies' use of contracts with ANCs to "pass through" work to particular subcontractors).

[153] *See, e.g.*, *Northern Lights and Procurement Plights*, *supra* note 140, at 9 (statement of Representative Henry A. Waxman).

[154] *See, e.g.*, *id*. at 120 (statement of Representative Nydia Velázquez) (noting SBA's "sheer lack of attention to the [8(a)] program"); *id.* at 134 (statement of David Cooper, Director of Acquisition Sourcing and Management, GAO) ("[F]ederal agency contracting officials need to do a better job of complying with certain requirements that are intended to preclude abuses of the 8(a) program.").

[155] *See, e.g.*, *id*. at 121-23 (statement of Representative Don Young); Native American Contracting Under Section 8(a) (continued...)

110th Congress

Several bills in the 110th Congress would have expanded eligibility for the 8(a) Program by allowing individuals with higher levels of net worth to qualify as economically disadvantaged for initial entry into, or continuing participation in, the Program, or by excluding certain properties from consideration when the SBA calculates net worth.[156] However, one bill would have narrowed eligibility in an attempt to combat fraud by requiring background checks of owners and officers of prospective 8(a) firms and creating a presumption that criminal convictions indicate a lack of business integrity.[157] Other bills would have made additional categories of small businesses (e.g., veteran-owned, women-owned) eligible for the 8(a) Program, or eligible for benefits like those provided under 8(a) or provided to 8(a) businesses under other federal programs.[158] Yet other bills would have restructured the 8(a) Program by (1) increasing the number of years that firms can participate in it;[159] (2) creating a pre-8(a) Program, which firms must generally complete prior to entering the 8(a) Program and eligibility for which cannot be based on several factors that SBA currently uses in determining eligibility for the 8(a) Program (e.g., potential for success, technical and managerial experience);[160] and (3) restricting set-asides to industries in which the Secretary of Commerce has determined that firms owned and controlled by socially and economically disadvantaged individuals are underrepresented.[161] Additional legislation would have increased the government-wide or agency-specific goals for contracting

(...continued)

of the Small Business Act: Economic, Social, and Cultural Impacts, Oct. 2007, *available at* http://www.nativecontractors.org/media/pdf/TAYLOR-REPORT.pdf (noting that ANCs paid $413 million in wages to employees and $32 million in dividends to shareholders in FY2005 as a result of federal contracting). Some commentators have expressed concern about the relatively low number of ANC shareholders or Alaska Natives employed by ANC-owned 8(a) firms. *See, e.g.*, Jenny J. Yang, Rising Giant: Policies and Costs of Section 8(a) Contracting Preferences for Alaska Native Corporations, 23 *Alaska L. Rev.* 315, 346-47 (2006). However, there is no requirement that 8(a) firms employ certain percentages of socially disadvantaged individuals.

[156] *See, e.g.,* 8(a) Modernization Act, H.R. 1611, § 3 (requiring the Administrator of the SBA to establish thresholds for maximum net worth for economic disadvantage based on industry classifications, with consideration of the capital needs of various industries); Minority-Owned Venture Empowerment Act, H.R. 2532, § 202 (raising the net worth for initial eligibility to $750,000); Small Business Contracting Program Improvements Act, H.R. 3867, § 501 (raising the net worth threshold for economic disadvantage to $550,000; providing that investments in other small businesses are excluded except when comparing firms to others in the same field owned by socially disadvantaged individuals; and allowing individuals who are determined to be economically disadvantaged at time of entry into the 8(a) Program to be deemed economically disadvantaged for the duration of the Program).

[157] *See, e.g.,* Small Business Contracting Program Improvements Act, H.R. 3867, § 201, 110th Cong.

[158] *See, e.g.,* Disabled Veteran Small Business Eligibility Expansion Act, H.R. 109, § 2 (making service-disabled veteran-owned small businesses eligible for the 8(a) Program and redefining "socially and economically disadvantaged small business concern" to include service-disabled veteran-owned small businesses); Service-Disabled Veteran-Owned Small Business Equity Act, H.R. 1265, § 2 (same); Coast Guard appropriation act for FY2008, H.R. 2830, § 219 (deeming women to be socially and economically disadvantaged for purposes of contracts awarded under the Coast Guard's Disadvantaged Business Enterprise Program); Small Business Contracting Program Improvements Act, H.R. 3867, § 505 (requiring the Administrator of SBA to review the list of groups whose members are presumed to be socially disadvantaged and "consider whether the list should be updated to include additional groups"); An Act to Amend the Small Business Act to Establish a Mentorship Program Designed to Help Minority and Women-Owned Small Businesses Build Their Capacities and Access to Contracting Opportunities in the Construction Industry, H.R. 7087, § 1 (making women-owned small businesses eligible for the same mentorship opportunities under the act as 8(a) businesses are eligible for).

[159] *See, e.g.,* Small Business Contracting Program Improvements Act, H.R. 3867, § 502.

[160] *See, e.g.,* Minority-Owned Venture Empowerment Act, H.R. 2532, §§ 102 and 202.

[161] *Id.* at § 303.

with small disadvantaged businesses, which include 8(a) firms;[162] allowed noncompetitive awards at higher values;[163] required agencies to develop plans to minimize the number of sole-source awards, including sole-source awards under Section 8(a);[164] and allowed protests of firms' eligibility for 8(a) awards.[165]

111th Congress

The 111th Congress is considering several bills that would make similar changes to the 8(a) Program, including

- allowing individuals with higher personal net worth to be eligible for the 8(a) Program;[166]
- requiring the SBA to periodically adjust the net-worth thresholds for inflation;[167]
- extending the length of the 8(a) Program and the developmental phase within the Program;[168]
- exempting businesses that have not completed an 8(a) contract from time limits on participation in the 8(a) Program;[169]
- extending the maximum term of participation in the 8(a) Program for individuals called to "active duty" in the U.S. military for more than 30 days;[170]
- increasing the government-wide goal for contracting with small businesses generally to 25% and that for contracting with small disadvantaged businesses to 10%;[171]
- specifying that individual small businesses may count toward government contracting goals in no more than two of the following categories: small business, service-disabled veteran-owned small business, Historically

---

162 *See, e.g.*, A Bill to Enact Title 51 of the United States Code, "National and Commercial Space Programs," as Positive Law, H.R. 4780, § 30304 (requiring the Administrator of NASA to annually establish a goal that at least 8% of NASA contract dollars be awarded to small disadvantaged businesses).

163 Small Business Contracting Program Improvements Act, H.R. 3867, § 204 (increasing the "competitive threshold" for nonmanufacturing contracts to $5.1 million); Minority-Owned Venture Empowerment Act, H.R. 2532, § 202 (raising the competitive threshold to $6 million for nonmanufacturing contracts and $10 million for manufacturing contracts); 8(a) Modernization Act, H.R. 1611, § 3 (raising the competitive thresholds to $10 for nonmanufacturing contracts and $12 million for manufacturing contracts).

164 Accountability in Contracting Act, H.R. 1362, § 102.

165 Small Business Contracting Program Improvements Act, H.R. 3867, § 205.

166 Minority Small Business Enhancement Act of 2009, H.R. 2299, § 2; An Act to Amend the Small Business Act to Change the Net Worth Amount Under the Small Business Program for Socially and Economically Disadvantaged Individuals from $750,000 to $978,722, H.R. 4253, § 1(a); Small Business Reform Act of 2010, H.R. 4818, § 3(b).

167 H.R. 4253, at § 1(a) (requiring annual adjustments).

168 H.R. 4818, at § 3(a).

169 H.R. 2299, at § 2.

170 Promoting Jobs for Veterans Act of 2009, H.R. 4220, § 104. As used here, "active duty" has the same meaning it has under 10 U.S.C. § 101(d)(2).

171 H.R. 2299, at § 5.

Underutilized Business Zone (HUBZone) small business, woman-owned small business, and small disadvantaged business;[172] and

- making service-disabled veteran-owned small businesses eligible for contracts under Section 8(a) by, among other things, including service-disabled veterans within the definition of "disadvantaged owner" and including service-disabled veteran-owned small businesses within the definition of "disadvantaged business."[173]

Other proposals would promote contracting with 8(a) firms by establishing new programs to increase their involvement in foreign trade and the construction industry;[174] allowing the Department of Defense to convert functions to performance by certain 8(a) firms without conducting the public-private competitions normally under OMB Circular A-76 when outsourcing;[175] and requiring that contractors holding Transportation Security Administration contracts in excess of $300 million "implement"[176] their plans for contracting with small disadvantaged businesses (including 8(a) firms).[177]

None of the bills introduced in the 110th Congress was enacted, and only one bill introduced in the 111th Congress—allowing the Department of Defense to convert functions to performance by certain 8(a) firms without conducting the public-private competitions normally under OMB Circular A-76—has been enacted to date.[178] However, the 8(a) Program will probably remain a topic of interest to Members, in part because of the changes in executive branch policies and legal developments affecting the program that are discussed in the following sections.

Changes in Executive Branch Policies

While proposed legislation in the 110th and 111th Congresses has focused upon the 8(a) Program generally, executive branch agencies have recently made or proposed changes to the Program focused upon contracting with ANC-owned firms specifically. First, in June, 2007, the Department of Homeland Security (DHS) issued "Guidance on the Use of 8(a) Firms Owned by Indian Tribes/Alaska Native Corporations," in which agency contracting officials were instructed to "be judicious" and rely on "appropriate safeguards" when entering sole-source contracts with tribally or ANC-owned firms. This guidance document called for DHS contracting officers to

[172] *Id.*

[173] Disabled Veteran Small Business Eligibility Expansion Act of 2009, H.R. 456, § 2.

[174] Freedom from Government Competition Act, S. 1167, § 4 and H.R. 2682, § 4.

[175] Small Business Export Enhancement and International Trade Act of 2009, S. 2862 (establishing a three-year pilot program to make grants to states to carry out export programs that assist 8(a) firms, among others); An Act to Amend the Small Business Act to Establish Mentorship and Assistance Programs Designed to Help Minority, Veteran-Owned, and Women-Owned Small Business Operate in the Construction Industry, H.R. 3771, § 2 (requiring the SBA to establish a mentorship program to assist 8(a) firms, among others, in gaining the "specialized knowledge" and "professional services" necessary to operate businesses in the construction industry).

[176] The focus upon implementation here potentially distinguishes this provision from existing law. Currently, contractors are required to make good faith efforts to comply with their subcontracting plans, but can be excused from implementing them in certain circumstances. *See* 15 U.S.C. § 637(d)(2)(F)(ii).

[177] Transportation Security Administration Authorization Act, H.R. 2200, § 103. H.R. 2200 would also require TSA to report annually to the House and Senate committees of jurisdiction on contractors' performance in subcontracting with small disadvantaged businesses.

[178] P.L. 111-118, § 8016,—Stat.—(Dec. 19, 2009).

ensure that the firm has the technical ability to perform the work, the firm will perform the required percentage of the work, and the award is in the best interest of the government.[179] Later, in April 2008, the Air Force issued "Sole Source Actions Over $550K." This document notes that there is "scrutiny involved with using sole source contracts simply as a means to reach particular subcontractors" and requires that all sole-source awards over $550,000 be justified in writing and approved by the Command Competition Advocate.[180] The SBA also reports having recently trained its 8(a) Program specialists on handling ANC-owned firms and its field staff on compliance with the 8(a) regulations.[181]

Proposed Changes in SBA Regulations

On October 28, 2009, SBA issued a proposed rule that would change certain eligibility and other requirements pertaining to the 8(a) Program.[182] **Table 3** summarizes the key, program-wide changes that SBA proposes.

Table 3. Key Changes to the 8(a) Regulations Proposed by the SBA in October 2009

Requirement	Proposed Changes
Economic disadvantage (13 C.F.R. § 124.104)	• Community property laws will not be taken into account when the SBA determines economic disadvantage, but the financial situation of individuals' spouses will be considered when determining individuals' access to credit and capital. (74 Fed. Reg. at 55698) • Funds in Individual Retirement Accounts (IRAs) and other official retirement accounts are exempted from the calculation of net worth provided that the funds cannot be withdrawn from the account prior to retirement age without a "significant penalty." (74 Fed. Reg. at 55698) • Income from S Corporations is exempted from the calculation of both income and net worth to the extent that such income is reinvested in the firm or used to pay taxes arising from the normal course of operations of an S corporation. (74 Fed. Reg. at 55698-99) • Individuals are presumed not to be economically disadvantaged if their adjusted gross

179 *See* DHS Acquisition Alert 07/15, *available at* http://www.nativecontractors.org/media/pdf/DHS-Agency-Guidance-on-8(a)-firms.pdf.

180 *See* ACC Policy Letter 08-01, *available at* http://www.nativecontractors.org/media/pdf/Air%20Force%20Sole%20Source%20Policy%20April%202008.pdf.

181 Testimony of Darryl Hairston, Acting Administrator, U.S. Small Business Administration, Before the U.S. House of Representatives Committee on Small Business, March 25, 2009, *available at* http://www.house.gov/smbiz/hearings/hearing-3-25-09-SBA-oversight/Hairston.pdf.

182 *See* Small Business Admin., Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations, 74 Fed. Reg. 55694 (Oct. 28, 2009). The SBA also proposes changes to the regulations governing the size standards for small businesses. Among other things, these changes would clarify that (1) protégés in other agencies' mentor/protégé programs are generally not exempt from SBA's size affiliation rules; (2) any joint venture that seeks to use 8(a) mentor/protégé status as grounds for an exemption to the affiliation requirements must follow the 8(a) requirements; (3) procurements for supplies cannot be classified under a North American Industry Classification System (NAICS) code for retail trade; and (4) the "nonmanufacturer rule"—requiring that firms that are not themselves the manufacturer of the end products being procured provide the products of small businesses—applies only when the procuring agency has classified the procurement under a manufacturing NAICS code. *Id.* at 55694-97. The proposed rule would also grant SBA's Office of Inspector General authority to request formal size determinations and make clear that certain requirements for the 8(a) Program do not apply to small disadvantaged businesses. *Id.* at 55697, 55710.

Requirement	Proposed Changes
	income averaged over the past two years exceeds $200,000, but they can rebut this presumption by showing that their income does not indicate a lack of economic disadvantage. (74 Fed. Reg. at 55699) • Individuals are not economically disadvantaged if the fair market value of their assets exceeds $3 million at the time of application to the 8(a) Program or $4 million thereafter. (74 Fed. Reg. at 55699)
Ownership (13 C.F.R. § 124.105)	• Firms are not automatically disqualified from the 8(a) Program because the individual seeking to qualify the firm has an immediate family member already participating in the 8(a) Program. SBA will make determinations regarding eligibility on a case-by-case basis, potentially allowing such firms to qualify when (1) there are no or negligible connections between the two firms and (2) the individuals seeking to use their disadvantaged status to qualify the firm can demonstrate sufficient management and technical experience to operate the firm. (74 Fed. Reg. at 55700)
Control (13 C.F.R. § 124.106)	• Disadvantaged managers of 8(a) firms must reside in the United States and spend part of every month physically present at the firm's primary offices. (74 Fed. Reg. at 55700) • Reserve members who are called to active duty in the U.S. military may either (1) designate one or more individuals to control daily business operations of their 8(a) firm during the time that they are gone or (2) suspend their participation in the 8(a) program during their active duty call-up period. (74 Fed. Reg. at 55700-01)
Credit toward contracting goals (13 C.F.R. § 124.503)	• Agencies may receive 8(a) credit for orders placed with 8(a) firms under indefinite-quantity/indefinite-delivery (ID/IQ) contracts not set aside for 8(a) firms so long as the order is offered to and accepted for the 8(a) Program and competed exclusively among eligible 8(a) firms, and the limitations on subcontracting apply to the individual order. (74 Fed. Reg. at 55704)
Acceptance and release of requirements (13 C.F.R. § 124.504)	• SBA may not accept requirements for the 8(a) Program when the procuring agency has expressed a clear intent to make HUBZone or SDVOSB awards. (74 Fed. Reg. at 55705) • Follow-on or repetitive 8(a) procurements must remain in the 8(a) Program unless SBA consents to release them for non-8(a) competition. (74 Fed. Reg. at 55705)
Delegation of contract administration (13 C.F.R. § 124.512)	• Procuring agencies exercising authority delegated to them by the SBA must track firms' compliance with the limitations on subcontracting. (74 Fed. Reg. at 55706-07) • When agencies' contracting officers modify contracts or exercise options under them, they must submit copies thereof to the SBA within 10 business days. (74 Fed. Reg. at 55706-07) • SBA may conduct periodic on-site reviews of other agencies' contract files to determine compliance with Program requirements. (74 Fed. Reg. at 55706-07)
Joint ventures involving 8(a) firms (13 C.F.R. § 124.513)	• 8(a) participants to 8(a) joint ventures must receive profits from the joint venture commensurate with the work they perform, and they must perform at least 40% of the work performed by the joint venture. (74 Fed. Reg. at 55707) • Each 8(a) firm that performs an 8(a) contract through a joint venture must report to the SBA on how these requirements regarding the performance of work were met. (74 Fed. Reg. at 55707) • SBA must approve any joint venture agreement prior to the award of an 8(a) contract to the joint venture. (74 Fed. Reg. at 55707)
Mentor/protégé program (13 C.F.R. § 124.520)	• Assistance provided through the mentor/protégé relationship must be tied to the protégé firm's SBA-approved business plan. (74 Fed. Reg. at 55707-08) • One mentor may have no more than three protégés. SBA may approve a second mentor for an 8(a) firm in certain circumstances. (74 Fed. Reg. at 55707-09)

Requirement	Proposed Changes
	• SBA may not approve mentor/protégé agreements when the protégé has less than 1 year left in the 8(a) Program. (74 Fed. Reg. at 55709) • Joint ventures between mentors and protégés qualify as "small" for purposes of federal subcontracts, as well as for federal prime contracts. (74 Fed. Reg. at 55709) • The mentor/protégé agreement must be approved by SBA prior to the submission of the bid or offer to take advantage of the exception to the size requirements. (74 Fed. Reg. at 55710) • Mentors that fail to provide the agreed upon assistance to their protégés are subject to sanctions, including stoppage of work on the contract, termination from the 8(a) Program and debarment from federal contracting. (74 Fed. Reg. at 55710)

Source: Congressional Research Service

Several other proposed changes pertain only to group-owned 8(a) firms. One proposed rule specifies that

> … a newly certified tribally-owned [or ANC-owned] Participant cannot receive an 8(a) contract in a secondary NAICS code that is the primary NAICS code of another Participant (or former participant that has left the program within two years of the date of application) owned by the tribe for a period of two years from the date of admission to the program.[183]

Other proposed rules would (1) remove the requirement that tribe members prove personal economic disadvantage in order to participate in the management of tribally owned firms;[184] (2) allow tribally and ANC-owned firms to be found to have potential for success if the tribe or ANC pledges to use its resources to support the firm and to not allow the firm to cease operations;[185] (3) require Indian tribes, ANCs, NHOs, and CDCs to submit information to the SBA annually showing how their participation in the 8(a) Program has benefited members of the group;[186] (4) change the location for SBA's initial review of ANC-owned firms' applications from the Anchorage District Office to the San Francisco Division of Program Certification and Eligibility;[187] (5) and prohibit non-8(a)firms that form joint ventures with 8(a) firms to perform sole-source contracts in excess of $3.5 million ($5.5 million for manufacturing contracts) from serving as subcontractors on the contract.[188]

SBA also seeks comments on, among other things, whether a "bright-line test" based on assets or net worth, or some other method, is best for determining whether an Indian tribe is economically disadvantaged; the implications of requiring Indian tribes to prove economic disadvantage only once to qualify firms for the 8(a) Program; and whether managers of tribally owned firms must be members of that tribe, or whether they need only be members of an Indian tribe.[189]

[183] 74 Fed. Reg. at 55702.
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Id.* at 55703.
[188] *Id.* at 55705-06.
[189] *Id.* at 55701.

The comment period on SBA's proposed rule ended on December 28, 2009,[190] and SBA has yet to promulgate a final rule.

Legal Decisions and Challenges

The 8(a) Program has also been the subject of legal challenges or decisions that could influence its future development. A lawsuit is currently pending that challenges the constitutionality of the 8(a) Program because of its presumption that minorities are socially disadvantaged, while a March 2, 2010, decision by the U.S. Court of Federal Claims held that set-asides for Historically Underutilized Business zone (HUBZone) small businesses take precedence over set-asides for 8(a) small businesses.

Constitutionality of 8(a) Program

In *Dynalantic Corporation v. U.S. Department of Defense*, a lawsuit currently pending in U.S. District Court for the District of Columbia, the plaintiff corporation alleges, among other things, that the 8(a) Program unconstitutionally deprives it of equal protection because of the Program's presumption that racial minorities are socially disadvantaged.[191] This presumption would probably constitute a racial classification subject to "strict scrutiny" when reviewed by the courts,[192] and a Department of Defense (DOD) contracting program incorporating a similar presumption was recently found unconstitutional because Congress did not have a "strong basis in evidence" for determining that minorities had been discriminated against it enacted the program.[193] Under strict scrutiny, the government must show that challenged programs are necessary to further a compelling government interest.[194]

The 8(a) Program is potentially distinguishable from the DOD program in that the DOD program included both a goal for contracting with disadvantaged businesses and a mechanism for meeting that goal (i.e., a 10% price evaluation preference),[195] while there are no goals for the percentage

[190] *Id.* at 55694.

[191] Dynalatic Corp. v. U.S. Dep't of Defense, Civil Action No. 95-2301 (EGS) (D.D.C.).

[192] *See, e.g.,* Rothe Dev. Corp. v. Dep't of Defense, 545 F.3d 1023 (Fed. Cir. 2008). In *Rothe*, DOD did not contest whether the presumption regarding race and disadvantage incorporated in the challenged program constituted a racial classification subjecting the program to strict scrutiny. However, some courts had previously denied firms or individuals standing to challenge programs with racial presumptions like that in DOD's program on the grounds that the would-be plaintiffs were denied the contract because of inability to demonstrate social and economic disadvantage, not because of race. *See, e.g.*, Interstate Traffic Control v. Beverage, 101 F. Supp. 2d 445 (S.D. W. Va. 2000); Ellsworth Assocs. v. United States, 926 F. Supp. 207 (D.D.C. 1996). For more on the *Rothe Development Corporation* decision, see CRS Report R40440, *Rothe Development Corporation v. Department of Defense: The Constitutionality of Federal Contracting Programs for Minority-Owned and Other Small Businesses*, by Jody Feder and Kate M. Manuel.

[193] Rothe Dev. Corp., 545 F.3d at 1049.

[194] *See, e.g.,* Shaw v. Hunt, 517 U.S. 899, 909-10 (1996); Concrete Works of Colorado, Inc. v. City & County of Denver, 321 F.3d 950, 958 (10th Cir. 2003).

[195] P.L. 99-661, § 1207, 100 Stat. 3816, 3973-75 (Nov. 14, 1986) (codified at 10 U.S.C. § 2323). A price evaluation adjustment works as follows: when comparing a bid or offer from a small disadvantaged business with one submitted by another business, the agency can subtract up to 10% of the price from the bid or offer submitted by the small disadvantaged business in determining which bid or offer has the lowest price or represents the best value. For example, if a business that is not a small disadvantaged business bids $100,000 and a small disadvantaged business bids $110,000, the small disadvantaged business would win because it is the lower bidder after its price is reduced by 10% ($110,000-$11,000=$99,000).

of federal contract dollars awarded to 8(a) firms.[196] Alternatively, a court might find that Congress had a strong basis in evidence when amending Section 8(a) of the Small Business Act in 1978 to allow SBA to subcontract only with "socially and economically disadvantaged small business concerns."[197] However, the plaintiff's case in *Dynalantic* survived DOD's initial motion for summary judgment in 2007,[198] and the parties have apparently not settled this litigation.

If the 8(a) Program as it presently exists, with its presumption that minorities are socially disadvantaged, were found unconstitutional, the 8(a) Program could potentially be reconstituted without the presumption. Such a program might require proof of actual social disadvantage from all applicants to the 8(a) Program, perhaps using the same three criteria currently used by individual applicants demonstrating personal social disadvantage.[199] This program could be similar to the HUBZone program, which currently provides set-asides for small businesses located in low-income areas that are often also socially disadvantaged. However, unlike with the HUBZone program, individuals who are socially and economically disadvantaged *and* in an area with average or above average employment and income could be eligible.[200] Alternatively, the 8(a) Program could continue as a program for small businesses owned by Indian tribes, ANCs, NHOs, or CDCs because tribes and other entities are not racial groups.[201] The presumption of social and/or economic disadvantage accorded to these groups would thus not implicate a racial classification and would probably be subject only to "rational basis" review. Rational basis review is characterized by deference to legislative judgment, and the party challenging a government program must show that it is not rationally related to a legitimate government interest.[202]

"Precedence" of HUBZone Set-Asides over 8(a) Set-Asides

In its March 2, 2010, decision in *Mission Critical Solutions v. United States*, the Court of Federal Claims held that set-asides for HUBZone small businesses take precedence over those for 8(a) small businesses.[203] *Mission Critical Solutions* was a bid protest filed with the court after the contracting agency, the U.S. Department of the Army, indicated that it would not comply with the recommendations that the GAO made in an earlier bid protest.[204] The GAO had recommended that the Army abandon its proposed sole-source award to an 8(a) firm in favor of a HUBZone set-aside because "mandatory" agency actions take precedence over "discretionary" ones, and it

[196] There are, however, goals for the percentage of contracts awarded to small disadvantaged businesses, which includes 8(a) businesses, under 15 U.S.C. § 644(g)(1)-(2).

[197] The legislative history of the 8(a) Program is arguably more extensive than that for the DOD program, although it is unclear whether this legislative history includes congressional findings based upon methodologically rigorous empirical studies that were current, nationwide in scope, and properly before Congress, such as were required in *Rothe*. *See* Rothe Dev. Corp., 545 F.3d at 1039-46.

[198] Dynalantic Corp. v. U.S. Dep't of Defense, 503 F. Supp. 2d 262 (D.D.C. 2007).

[199] *See* 13 C.F.R. § 124.103(c)(2) (standards of evidence for showing personal disadvantage).

[200] *See* 15 U.S.C. § 657a (describing the HUBZone program); 48 C.F.R. § 19.1305 (same).

[201] Although the classification of individuals as "Native Americans" might seem like a racial one, courts have found that it is not. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 548 (1973). Native Americans are generally viewed as a political class, and programs targeting them are generally found to be programs "reasonably designed to further the cause of Indian self-government." *Id.* at 548.

[202] *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

[203] Mission Critical Solutions v. United States, 2010 U.S. Claims LEXIS 36 (Mar. 2, 2010).

[204] *Id.* at *7-*11.

construed the HUBZone Act as *requiring* HUBZone set-asides whenever at least two HUBZone firms are expected to submit offers and Section 8(a) as *allowing* 8(a) set-asides whenever agency officials "determine[] such action is necessary or appropriate."[205] The Office of Legal Counsel (OLC) at the Department of Justice disagreed, finding that the provisions of the Small Business Act regarding the set-aside programs are ambiguous and the SBA regulations providing for parity among the set-aside programs constitute reasonable interpretations of the governing statute.[206] OLC instructed agencies that its decisions are "binding on all Executive Branch agencies, notwithstanding any GAO decisions to the contrary,"[207] and the Army proposed proceeding with the contested award.[208] Mission Critical Solutions then filed suit in the Court of Federal Claims to enjoin this award.[209]

Like the GAO, the Court of Federal Claims relied upon the text of the Small Business Act and principles of statutory interpretation to find that HUBZone set-asides have precedence over 8(a) set-asides. Three provisions of the Small Business Act—two in the HUBZone Act and one in Section 8(a)—were key to the court's decision. First, the court construed language in the HUBZone Act regarding set-asides "[n]otwithstanding any other provision of law" to mean that the "provisions of the 'notwithstanding' section override conflicting provisions of any other section," including those regarding 8(a) set-asides.[210] In so finding, the court rejected the government's argument that the phrase "notwithstanding any other provision of law" need not be construed literally.[211] It did so because it found that the cases the government relied upon in support of this argument involved statutes which clearly indicated that certain provisions were to be excluded from the application of the "notwithstanding" provisions and were thus

---

[205] Mission Critical Solutions, 2009 U.S. Comp. Gen. LEXIS 86, at *15 (May 4, 2009). The GAO specifically contrasted the language of 15 U.S.C. § 657a(b)(2), which states that "[n]otwithstanding any other provision of law … a contract opportunity shall be awarded pursuant to this section on the basis of competition restricted to qualified HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price," with that of 15 U.S.C. § 637(a)(1)(A), which states that:

> … [i]t shall be duty of the [SBA] and it is hereby empowered, whenever it determines such action is necessary or appropriate … to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers obligating the [SBA] to furnish articles, equipment, supplies, services, or materials to the Government or to perform construction work for the Government. In any case in which the [SBA] certifies to any officer of the Government having procurement powers that the [SBA] is competent and responsible to perform any specific Government procurement contract to be let by any such officer, such officer shall be authorized in his discretion to let such procurement contract to the [SBA] upon such terms and conditions as may be agreed upon between the [SBA] and the procurement officer.

[206] Office of Legal Counsel, Department of Justice, Permissibility of Small Business Administration Regulations Implementing the Historically Underutilized Business Zone, 8(a) Business Development, and Service-Disabled Veteran-Owned Small Business Concern Programs, Aug. 21, 2009, *available at* http://www.usdoj.gov/olc/2009/sba-hubzone-opinion082109.pdf.

[207] *Id.* at 13-14. The Office of Management and Budget had previously directed agencies to maintain parity among the set-aside programs pending an "Executive Branch review of the legal basis underlying the GAO's decisions." Executive Office of the President, Office of Mgmt. & Budget, Recent Government Accountability Office Decisions Concerning Small Business Programs, July 10, 2009, *available at* http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-23.pdf.

[208] Mission Critical Solutions, 2010 U.S. Claims LEXIS at *8.

[209] *Id.* at *10-*11.

[210] *Id.* at *48-*49 (quoting *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993)).

[211] *Id.* at *27 (relying on *Or. Natural Res. Council v. Thomas*, 92 F.3d 792, 796-97 (9th Cir. 1996) and *In re Glacier Bay*, 944 F.2d 577, 582 (9th Cir. 1991)).

distinguishable from the Small Business Act.[212] The court also found that language in 15 U.S.C. § 657a(b)(4) regarding the relationship between the HUBZone program and the Federal Prison Industries and Javits-Wagner-O'Day programs indicated that "if Congress wished to establish the relationship of the HUBZone program to another contracting preference program, it knew how to do so."[213] Second, the court construed the use of "shall" in the HUBZone Act to indicate mandatory agency actions, and its absence in Section 8(a) to indicate discretionary agency actions.[214] It rejected the government's argument that HUBZone set-asides are only mandatory in comparison to HUBZone sole-source awards and that, notwithstanding the use of "shall" or "may" in a statute, the court may consider "indications of legislative intent to the contrary or obvious inferences from the structure or purpose of the statute."[215] Finally, the court construed the language in Section 8(a) about contracts "offered for award pursuant to this section" as further indicating that 8(a) awards are discretionary.[216] It found similar language—and discretion—lacking in the HUBZone Act.[217]

The court gave no weight to the alleged parity accorded to the various set-aside programs under 15 U.S.C. § 637(d) and 15 U.S.C. § 644(g), which, respectively, require certain prime contractors to agree to plans for subcontracting with small businesses and establish government-wide and agency-specific goals for the percentage of federal contract and subcontract dollars awarded to small businesses.[218] The court was not persuaded by the government's argument that the lack of mention of precedence among the set-aside programs in these sections indicated parity.[219] The court also gave no weight to those aspects of the legislative history that the government claimed indicated that Congress intended there to be parity among the set-aside programs.[220] It noted that examination of the legislative history is not necessary when the statutory language is clear because "[t]he language of the statute is the best indication of Congress's intent."[221] However, it also noted that key evidence in the government's resort to legislative history did not necessarily carry the significance that the government attributed to it.[222] Further, the court gave no deference to SBA regulations providing for parity among the set-aside programs because it found these regulations were not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[223] According to the court, because the statute's plain meaning is apparent

[212] *Id.* at *28-*29.

[213] *Id.* at *36.

[214] *Id.* at *51-*56.

[215] *Id.* at *52. The government specifically relied upon *Ky., Educ. Cabinet, Dep't for the Blind v. United States*, 424 F.3d 1222, 1227 (Fed. Cir. 2005) ("Congress's use of the two terms 'may' or 'shall' does not end the analysis. … [The Court may consider] indications of legislative intent to the contrary or [] obvious inferences from the structure and purpose of the statute.").

[216] *Id.* at *56-*64.

[217] *Id.*

[218] *Id.* at *23-*26.

[219] *Id.* at *25.

[220] *Id.* at *64-*77.

[221] *Id.* at *76 (quoting *Shoshone Indian Tribe of Wind River Reservation v. United States,* 364 F.3d 1339, 1345 (Fed. Cir. 2004).

[222] For example, the court said that deletion of proposed language regarding parity among the set-aside programs from the HUBZone Act when it was enacted could have meant that Congress did not intend for the set-aside programs to have parity. *Id.* at *72-73. Its deletion did not necessarily mean that Congress construed the statute as providing for parity, in the court's view. *Id.* at *72.

[223] *Id.* at *78-*86.

and "Congress has directly spoken to the precise question at issue," the SBA's interpretation of the statute is given no deference, especially when it is at variance with the statutory language.[224]

If not reversed on appeal, the Court of Federal Claim's decision could lead to HUBZone small businesses receiving a greater percentage of federal contract dollars while 8(a) firms receive less.[225] Currently, the government-wide goal is that 3% of federal contract dollars go to HUBZone small businesses, while 5% of federal contract and subcontract dollars go to 8(a) small businesses.[226] Achieving the 8(a) goal, in particular, could be difficult if agencies *must* use a HUBZone set-aside whenever the contract officer reasonably expects that at least two qualified HUBZone small businesses will submit offers and the award can be made at a fair market price.

Two Members of the 111th Congress have introduced legislation (H.R. 3729, S. 1489) that could make HUBZone set-asides discretionary and remove the basis upon which the Court of Federal Claims and GAO found that HUBZone set-asides have precedence over 8(a) set-asides.

---

224 *Id.* at *86. The Court also rejected the argument that Congress "acquiesced to the SBA's parity regulations, and has affirmatively adopted the OLC legal opinion" because of language included in the conference report on the National Defense Authorization Act (NDAA) for FY2010. The version of the NDAA passed by the Senate would have substituted "may" for "shall" in the HUBZone Act. *See* S. 1390, § 838, as engrossed. However, this language was omitted by the conferees because

> … the Department of Justice has concluded that no change to the Small Business Act is required to ensure that contracting officers of the Department of Defense and other federal agencies have the discretion whether or not to award contracts pursuant to the HUBZone program. The conferees direct the Secretary of Defense to continue to administer the HUBZone program in a manner consistent with the Department of Justice opinion.

H.R. Rep. No. 111-288, at 789 (2009). The court did not find this purported "acquiescence" determinative. Instead, it noted that congressional statements about the proper interpretation of a statute made subsequent to its enactment are "of little persuasive authority." Mission Critical Solutions, 2010 U.S. Claims LEXIS at *75.

225 Commentators made this point regarding the earlier GAO decisions recommending that HUBZone set-asides have precedence over set-asides for 8(a) and service-disabled veteran-owned small businesses. *See, e.g.*, HUBZone Council, GAO Gives HUBZone Program Priority over Service Disabled Veteran Owned Firms, Nov. 6, 2008, *available at* http://www.ppi-timezero.com/resource-documents/hubzonerelease.pdf (hailing the decision's potential impact on HUBZone small businesses); SBA Warns of Turmoil without Parity Rule, *Entrepreneur.com*, Nov. 7, 2008, *available at* http://www.entrepreneur.com/tradejournals/article/189159380.html (warning that HUBZone companies "could receive a disproportionate share of set-aside contracts, squeezing out other groups").

226 15 U.S.C. § 644(g)(1). There are also agency-specific goals, which tend to be set at 3% and 5% of contract dollars for HUBZone and 8(a) small businesses, respectively. *See* U.S. Small Bus. Admin., FY2008 Goals and Achievements, *available at* http://www.sba.gov/idc/groups/public/documents/sba_homepage/fy2008goals_and_achievements.html.

Appendix. Comparison of the Requirements Pertaining to 8(a) Businesses Generally, Tribally Owned Businesses, ANC-Owned Businesses, and Others

Requirements	8(a) Businesses Generally	Tribally Owned 8(a) Businesses	ANC-Owned 8(a) Businesses	NHO-Owned 8(a) Businesses	CDC-Owned 8(a) Businesses
"Small"	Independently owned and operated; not dominant in field of operation; meets size standards (15 U.S.C. § 631(a)) All affiliations count (13 C.F.R. § 121.103)	Independently owned and operated; not dominant in field of operation; meets size standards (15 U.S.C. § 631(a)) Affiliations based on the tribe or tribal ownership, among others, do not count (13 C.F.R. § 124.109(c)(2))	Independently owned and operated; not dominant in field of operation; meets size standards (15 U.S.C. § 631(a)) Affiliations based on the ANC or ownership by the ANC, among others, do not count (13 C.F.R. § 124.109(c)(2))	Independently owned and operated; not dominant in field of operation; meets size standards (15 U.S.C. § 631(a)) Affiliations based on the NHO or ownership by the NHO, among others, do not count (13 C.F.R. § 124.110(c))	Independently owned and operated; not dominant in field of operation; meets size standards (15 U.S.C. § 631(a)) Affiliations based on the CDC or ownership by the CDC, among others, do not count (13 C.F.R. § 124.111(c))
"Business"	For-profit entity with its place of business in the United States; operates primarily within the United States or makes a significant contribution to the U.S. economy (13 C.F.R. § 121.105(a)(1))	For-profit entity with its place of business in the United States; operates primarily within the United States or makes a significant contribution to the U.S. economy (13 C.F.R. § 121.105(a)(1))	For-profit entity with its place of business in the United States; operates primarily within the United States or makes a significant contribution to the U.S. economy (13 C.F.R. § 121.105(a)(1)) Although ANC may be non-profit, ANC-owned firms must be for-profit to be eligible for 8(a) Program (13 C.F.R. § 124.109(a)(3))	For-profit entity with its place of business in the United States; operates primarily within the United States or makes a significant contribution to the U.S. economy (13 C.F.R. § 121.105(a)(1))	For-profit entity with its place of business in the United States; operates primarily within the United States or makes a significant contribution to the U.S. economy (13 C.F.R. § 121.105(a)(1))
"Unconditionally owned and controlled"	At least 51% unconditionally and directly owned by one or more disadvantaged individuals who are U.S. citizens (13 C.F.R. § 124.105) Management and daily	At least 51% tribally owned (13 C.F.R. § 124.109(b)) Management may be conducted by individuals who are not members of the tribe provided that the SBA determines that such management is necessary to	At least 51% ANC-owned (13 C.F.R. § 124.109(a)(3)) Management may be conducted by individuals who are not Alaska Natives provided that the SBA determines that such management is necessary to	At least 51% NHO-owned (13 C.F.R. § 124.110(a)) Not explicitly addressed in regulation[a]	At least 51% CDC-owned (13 C.F.R. § 124.111(a)) Management and daily business operations to be conducted by individuals having managerial experience of an extent and complexity needed to run the firm (13 C.F.R. § 124.111(b))

Requirements	8(a) Businesses Generally	Tribally Owned 8(a) Businesses	ANC-Owned 8(a) Businesses	NHO-Owned 8(a) Businesses	CDC-Owned 8(a) Businesses
	business operations must be conducted by one or more disadvantaged individuals (13 C.F.R. § 124.106)	assist the business's development, among other things (13 C.F.R. § 124.109(c)(4)(B))	assist the business's development, among other things (13 C.F.R. § 124.109(c)(4)(B))		
"Socially disadvantaged individual"	Members of designated groups presumed to be socially disadvantaged; other individuals may prove personal disadvantage by a preponderance of the evidence (13 C.F.R. § 124.103)	Indian tribes presumed to be socially disadvantaged (13 C.F.R. § 124.109(b)(1))	ANCs presumed to be socially disadvantaged (13 C.F.R. § 124.109(b)(1))	NHOs presumed to be socially disadvantaged (13 C.F.R. § 124.109(b)(1))	CDCs presumed to be socially disadvantaged (42 U.S.C. § 9815(a)(2))
"Economically disadvantaged individual"	Financial information (e.g., personal income, personal net worth, fair market value of assets) must show diminished financial capital and credit opportunities (13 C.F.R. § 124.104)	Tribe must prove economic disadvantage the first time a tribally owned firm applies to the 8(a) Program; thereafter, a tribe need only prove economic disadvantage at the request of the SBA (13 C.F.R. § 124.109(b)(2))	Deemed to be economically disadvantaged (13 C.F.R. § 124.109(a)(2))	Not explicitly addressed in regulation[a]	CDCs presumed to be economically disadvantaged (42 U.S.C. § 9815(a)(2))
"Good character"	No criminal conduct or violations of SBA regulations; cannot be debarred or suspended from government contracting (13 C.F.R. § 124.108(a))	No criminal conduct or violations of SBA regulations; cannot be debarred or suspended from government contracting (13 C.F.R. § 124.108(a)) Requirement applies only to officers, directors, and shareholders owning more than a 20% interest in the business, not to all members of the tribe (13 C.F.R. § 124.109(c)(7)(B)(ii))	No criminal conduct or violations of SBA regulations; cannot be debarred or suspended from government contracting (13 C.F.R. § 124.108(a)) Requirement applies only to officers, directors, and shareholders owning more than a 20% interest in the business, not to all ANC shareholders (13 C.F.R. § 124.109(c)(7)(B)(ii))	No criminal conduct or violations of SBA regulations; cannot be debarred or suspended from government contracting (13 C.F.R. § 124.108(a)) Regulations do not address to whom requirements apply[a]	No criminal conduct or violations of SBA regulations; cannot be debarred or suspended from government contracting (13 C.F.R. § 124.108(a)) Requirements apply to the firm and "all its principals" (13 C.F.R. § 124.111(g))
"Demonstrated potential for success"	Firm must generally have been in business in	Firm must generally have been in business in primary industry	Firm must generally have been in business in primary industry	Firm must generally have been in business	Firm must generally have been in business in primary industry for at

Requirements	8(a) Businesses Generally	Tribally Owned 8(a) Businesses	ANC-Owned 8(a) Businesses	NHO-Owned 8(a) Businesses	CDC-Owned 8(a) Businesses
	primary industry for at least two full years prior to date of application to 8(a) Program unless SBA grants a waiver; waiver based on 5 conditions[b] (13 C.F.R. § 124.107)	for at least two full years prior to date of application to 8(a) Program unless SBA grants a waiver; waiver based on 3 conditions[c] (13 C.F.R. § 124.109(c)(6))	for at least two full years prior to date of application to 8(a) Program unless SBA grants a waiver; waiver based on 3 conditions[c] (13 C.F.R. § 124.109(c)(6))	in primary industry for at least two full years prior to date of application to 8(a) Program unless SBA grants a waiver; waiver based on 3 conditions[c] (13 C.F.R. § 124.110(e))	least two full years prior to date of application to 8(a) Program unless SBA grants a waiver; waiver based on 3 conditions[c] (13 C.F.R. § 124.111(f)
Sole-source awards	With contracts valued at over $3.5 million ($5.5 million for manufacturing contracts), sole-source awards permissible only if there is not a reasonable expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (48 C.F.R. § 19.805-1(b)(1)-(2))	Can be made with contracts valued at over $3.5 million ($5.5 million for manufacturing contracts) even if there is a reasonable expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (48 C.F.R. § 19.805-1(b)(1)-(2))	Can be made with contracts valued at over $3.5 million ($5.5 million for manufacturing contracts) even if there is a reasonable expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (48 C.F.R. § 19.805-1(b)(1)-(2))	Can be made with Department of Defense contracts valued at over $3.5 million ($5.5 million for manufacturing contracts) even if there is a reasonable expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (48 C.F.R. § 219.805-1(b)(2)(A)-(B)). Otherwise cannot be made unless there is not a reasonable expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (48 C.F.R. § 19.805-1(b)(1)-(2))	With contracts valued at over $3.5 million ($5.5 million for manufacturing)contracts, sole-source awards permissible only if there is not a reasonable expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (48 C.F.R. § 19.805-1(b)(1)-(2))
Inability to protest eligibility for award	Firm's eligibility for award cannot be challenged or protested as part of the solicitation or proposed	Firm's eligibility for award cannot be challenged or protested as part of the solicitation or proposed contract award (48 C.F.R. §	Firm's eligibility for award cannot be challenged or protested as part of the solicitation or proposed contract award (48 C.F.R. §	Firm's eligibility for award cannot be challenged or protested as part of the solicitation or	Firm's eligibility for award cannot be challenged or protested as part of the solicitation or proposed contract award (48 C.F.R. § 19.805-2(d))

Requirements	8(a) Businesses Generally	Tribally Owned 8(a) Businesses	ANC-Owned 8(a) Businesses	NHO-Owned 8(a) Businesses	CDC-Owned 8(a) Businesses
	contract award (48 C.F.R. § 19.805-2(d))	19.805-2(d))	19.805-2(d))	proposed contract award (48 C.F.R. § 19.805-2(d))	
Maximum of nine years in the 8(a) Program	Firm receives "a program term of nine years" but could be terminated or graduated early (13 C.F.R. § 124.2)	Firm receives "a program term of nine years" but could be terminated or graduated early (13 C.F.R. § 124.2)	Firm receives "a program term of nine years" but could be terminated or graduated early (13 C.F.R. § 124.2)	Firm receives "a program term of nine years" but could be terminated or graduated early (13 C.F.R. § 124.2)	Firm receives "a program term of nine years" but could be terminated or graduated early (13 C.F.R. § 124.2)
One-time eligibility for 8(a) Program	Applies to both disadvantaged owners and firms (13 C.F.R. § 124.108(b))	Applies only to tribally owned firms, not tribes (15 U.S.C. § 636(j)(11)(B)-(C))	Applies only to ANC-owned firms, not ANCs (15 U.S.C. § 636(j)(11)(B)-(C))	Applies only to NHO-owned firms, not NHOs (15 U.S.C. § 636(j)(11)(B)-(C))	Applies only to CDC-owned firms, not CDCs (15 U.S.C. § 636(j)(11)(B)-(C))
Limits on majority ownership in 8(a) firms	Individuals determined to be disadvantaged for purposes of 8(a), their immediate family members, and 8(a) firms themselves may own no more than 20% in any other 8(a) firm (13 C.F.R. § 124.105(g))	May not own 51% or more of a firm obtaining the majority of its revenues from the same primary industry in which another tribally owned firm currently operates or has operated within the past two years; otherwise, no limit on the number of tribally owned firms that operate in other primary industries or on the ownership of multiple firms in the same secondary industry (13 C.F.R. § 124.109(c)(3)(ii))	May not own 51% or more of a firm obtaining the majority of its revenues from the same primary industry in which another ANC-owned firm currently operates or has operated within the past two years; otherwise, no limit on the number of ANC-owned firms that operate in other primary industries or on the ownership of multiple firms in the same secondary industry (13 C.F.R. § 124.109(c)(3)(ii))	May not own 51% or more of a firm obtaining the majority of its revenues from the same primary industry in which another NHO-owned firm currently operates or has operated within the past two years; otherwise, no limit on the number of NHO-owned firms that operate in other primary industries or on the ownership of multiple firms in the same secondary industry (13 C.F.R. § 124.110(c))	May not own 51% or more of a firm obtaining the majority of its revenues from the same primary industry in which another CDC-owned firm currently operates or has operated within the past two years; otherwise, no limit on the number of CDC-owned firms that operate in other primary industries or on the ownership of multiple firms in the same secondary industry 13 C.F.R. § 124.111(d))
Limits on the amount of 8(a) contracts that a firm may receive	No source awards possible once the firm has received a total of $100 million, or other applicable value, in 8(a)	Can make sole-source awards even when a firm has received a total of $100 million, or other applicable value, in 8(a) contracts (13 C.F.R. §	Can make sole-source awards even when a firm has received a total of $100 million, or other applicable value, in 8(a) contracts (13 C.F.R. §	No source awards possible once the firm has received a total of $100 million, or other applicable value, in	No source awards possible once the firm has received a total of $100 million, or other applicable value, in 8(a) contracts (13 C.F.R. § 124.519(a)(1)-(2))

.

Requirements	8(a) Businesses Generally	Tribally Owned 8(a) Businesses	ANC-Owned 8(a) Businesses	NHO-Owned 8(a) Businesses	CDC-Owned 8(a) Businesses
	contracts (13 C.F.R. § 124.519(a)(1)-(2)) Firms must receive an increasing percentage of revenue from non-8(a) sources throughout their participation in the 8(a) Program (13 C.F.R. § 124.509(b))	124.519(a)(1)-(2)) Firms must receive an increasing percentage of revenue from non-8(a) sources throughout their participation in the 8(a) Program (13 C.F.R. § 124.509(b))	124.519(a)(1)-(2)) Firms must receive an increasing percentage of revenue from non-8(a) sources throughout their participation in the 8(a) Program (13 C.F.R. § 124.509(b))	8(a) contracts (13 C.F.R. § 124.519(a)(1)-(2)) Firms must receive an increasing percentage of revenue from non-8(a) sources throughout their participation in the 8(a) Program (13 C.F.R. § 124.509(b))	Firms must receive an increasing percentage of revenue from non-8(a) sources throughout their participation in the 8(a) Program (13 C.F.R. § 124.509(b))

Source: Congressional Research Service.

a. The rules governing NHO- and/or CDC-owned firms do not address this issue, and although the general rules apply where no "special rules" exist, it seems unlikely that NHO- and/or CDC-owned firms are treated differently than tribally or ANC-owned firms in this regard.

b. These criteria include (1) the management experience of the disadvantaged individual(s) upon whom eligibility is based; (2) the business's technical experience; (3) the firm's capital; (4) the firm's performance record on prior federal or other contracts in its primary field of operations; and (5) whether the firm presently has, or can demonstrate its ability to timely obtain, the personnel, facilities, equipment, and other resources necessary to perform contracts under Section 8(a).

c. These criteria include (1) the technical and managerial experience and competency of the individuals who will manage and control the daily operation of the concern; (2) the financial capacity of the concern; and (3) the concern's performance record on prior federal or other contracts in the firm's primary industry.

Author Contact Information

John R. Luckey
Legislative Attorney
jluckey@crs.loc.gov, 7-7897

Kate M. Manuel
Legislative Attorney
kmanuel@crs.loc.gov, 7-4477